Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

VERN T. WEISS, *et al.*,

Petitioners,

v.

STATE OF ALASKA, *et al.*,

Respondents,

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR A WRIT OF CERTIORARI

James B. Gottstein*
Bruce A. Moore
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D. C. 20009
(202) 588-1000

David T. Walker
417 Harris Street
Juneau, Alaska 99801
(907) 586-3537

Barry S. Rosen
30 South Wacker Dr., 29th Floor
Chicago, Illinois 60606-7484
(312) 207-1000

Counsel for Petitioners
*Counsel of Record

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QUESTIONS PRESENTED

In 1956, Congress established a trust of 1 million acres of land in Alaska to be used for mental health programs. When Alaska did not comply with the federal law creating the trust, a class action was brought and a settlement was eventually approved over the objection of the petitioners who had been designated as class representatives. The questions presented are:

1. May a state court approve a settlement of class action claims arising under federal law premised on clear misinterpretations of federal law?

2. May a state court, consistent with Due Process, approve a settlement of class action claims arising under federal law where (a) the original class counsel, without notice to any class member, agreed to a set-off defense that substantially undermined the value of the class claims, and (b) those who supported the settlement were never found to fairly represent the class and admitted that they failed to investigate one of the class' federal damages claims worth potentially over $1 billion?

PARTIES TO THE PROCEEDINGS

Petitioners are Vern T. Weiss, father and next friend of Carl Weiss, on behalf of himself and all others similarly situated; and Mary C. Nanuwak and Billy R. Cross, on behalf of themselves and all others similarly situated.

Respondents are the State of Alaska; Anita Bosel, Frances Doulin, Sharon Goodwin and Gabriel Mayoc; H.L., M.K., and Alaska Addiction Rehabilitation Services; Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited; Marathon Oil Company and Union Oil Company of California; Usibelli Coal Company; Idemitsu Alaska, Inc.; and John Morris.

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PETITION FOR WRIT OF CERTIORARI

Vern T. Weiss, on behalf of himself and all others similarly situated, and Mary C. Nanuwak and Billy R. Cross, on behalf of themselves and all others similarly situated, respectfully petition for a *writ of certiorari* to review the judgment of the Alaska Supreme Court in this case.

OPINIONS BELOW

Weiss v. State of Alaska, Opinion No. 4816 (Alaska May 2, 1997). (Appendix A).

State of Alaska v. Weiss, 706 P.2d 681 (Alaska 1985). (Appendix B).

Memorandum Decision and Order Granting Final Approval to the HB 201 Settlement, Dec. 6, 1994. (Appendix C).

Memorandum Decision and Order (Beneficiaries), April 27, 1988. (Appendix D).

JURISDICTION

The judgment of the Supreme Court of Alaska affirming the judgment of the trial court was entered on May 2, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Alaska Mental Health Enabling Act, Pub.L. No. 84-830, 70 Stat. 709, 711 (1956), at §202 (a) and (e), provides:

Sec 202. (a) The Territory of Alaska is hereby granted and shall be entitled to select, within ten years from the effective date of this Act, not to exceed one million acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: Provided, That nothing herein contained shall affect any valid existing rights. All lands duly selected by the Territory of Alaska pursuant to this section shall be patented to the Territory by the Secretary of the Interior.

* * *

(e) All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

Pertinent portions of Alaska Statutes are reproduced at Appendix J.

INTRODUCTION

In 1956, Congress granted Alaska the right to select the best one million acres of available federal land in Alaska "as a public trust" to be used "first . . . to meet the necessary expenses of the mental health program of Alaska." However, the State never managed nor accounted for the Trust separately from its own land and enacted legislation in 1978 to formally transfer ownership to itself. For almost twenty years thereafter, the State of Alaska has relentlessly sought to retain land granted in trust under the Congressionally created Alaska Mental Health Lands Trust (Trust) for its own non-trust purposes in violation of federal law. In 1994, the State negotiated a settlement with intervenors in this class action that blessed its confiscation of Trust Land. The approval of that settlement -- in violation of the federal law creating that Trust and accomplished by procedures that do not comport with Due Process -- forms the basis of this petition.

At stake are hundreds of millions of dollars worth of resources that Alaska has misappropriated for purposes not intended by Congress. When discussing other states' predations on similar trusts, the Arizona Supreme Court observed nine years before Congress passed the statute at issue here:

> The sad experience of Congress with the handling by these twenty-three states of the granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona. *The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states*, left a scandal in virtually every state and these granted lands and the monies derived from a disposition thereof were so poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

Murphy v. State, 181 P.2d 336, 344 (Ariz. 1947) (emphasis added). Here, employing the class action settlement approval process, the Alaska Supreme Court allowed the same dissipation recounted in *Murphy* in violation of the Alaska Mental Health Enabling Act and Due Process.

STATEMENT OF THE CASE

In 1956, Congress granted Alaska the right to select one million acres of public (federal) land and directed:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska.

Sec. 202(e), Alaska Mental Health Enabling Act (hereinafter "Enabling Act"), Pub. L. No. 84-830, 70 Stat. 709 (1956).

After selecting the best available land in Alaska for income production (Exc. at 670),[1] the State never established trust management -- not even creating a trust account. (App. B at 3). Because the land was so desirable, there was tremendous political pressure on the Alaska government to utilize it for non-trust purposes (App. C at 7), and in 1978, the Alaska legislature enacted legislation "redesignating" Mental Health Trust Land as its own general grant land. (App. B at 3). As the trial court observed in its decision regarding preliminary approval of the settlement: "DNR [the Alaska Department of Natural Resources] generally has managed the lands as if there was no mental health lands trust and as if DNR had no fiduciary obligations to the beneficiaries of the trust." (Exc. at 705). By 1985, less than 35% of the Trust's land remained intact. (App. A at 6).

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[1] The designation "Exc." is to the Excerpt of Record prepared for the Alaska Supreme Court.

On November 26, 1982, one of the legislators who voted for "redesignating" Trust Land (hereinafter "Original Class Counsel"), filed the complaint in this action against the State of Alaska, naming Petitioner Weiss herein as a representative plaintiff on behalf of "all persons who are residents of the State of Alaska who will require mental health services." (Exc. at 23). The complaint sought to (1) invalidate the 1978 redesignation statute as a violation of the Enabling Act, (2) establish a trust account, and (3) require the State to administer the Trust in accordance with the Enabling Act.[2] (Exc. at 24). The class was certified on January 26, 1983, under Ak. R. Civ. P. 23(b)(2) with Petitioner Weiss designated a class representative. (Exc. at 27).

By Memorandum Decision dated June 14, 1983, the trial court granted partial summary judgment against the State and ordered an accounting, but decided invalidation of the 1978 redesignation legislation was an "improper remedy," citing the Alaska Supreme Court case of *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981). (App. E at 4). On September 5, 1984, without consulting Mr. Weiss or any other class representative, Original Class Counsel and counsel for the State stipulated to entry of a final judgment as to less than all "issues" under Ak. R. Civ. P. 54(b), in order to allow an immediate appeal to the Alaska Supreme Court. (App. H). Paragraph 4 of the stipulation provides that in calculating the amount due to the Trust from the State for taking all of the Trust's land under the redesignation statute, the State is allowed a credit (a deduction or "set-off") in the amount of all its mental health services appropriations. (App. H-3). In other words, if the Trust Land was worth $100 million and the State had spent $100 million for mental health services from its general fund, *under the stipulation, the State owed nothing for taking all of the Trust's land.* Nine days later, on September 14, 1984, the form of judgment prepared by the State and lodged with the stipulation was entered by the trial court (hereinafter the "Rule 54(b) Judgment"). (App. F).

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[2] This action is completely predicated upon compliance with the federal Enabling Act and because, as is apparent, errors of federal law were raised throughout, Petitioners are not separately identifying Rule 14(g)(*i*) in each instance.

On September 26, 1984, Petitioner Nanuwak (along with the Alaska Mental Health Association and John Martin, on behalf of themselves and all others similarly situated), through counsel of record here, moved to intervene because "the interests of the class members were being so seriously jeopardized with immediate harm" by the representation of Original Class Counsel. (WIR at 310).[3] In addition to joining the Complaint, Petitioner Nanuwak filed additional claims seeking orders (1) invalidating transfers of Trust Land to third parties, (2) depositing all Trust Lands "into the public trust mandated by the Enabling Act to be administered according to law," and (c) "establishing an independent Board to act as the Trustee . . . [with] sufficient independent public member to foreclose future violations of the Trust." (Exc. at 47). On October 31, 1984, the trial court denied this motion to intervene as untimely. (Exc. at 51).

The State appealed the Rule 54(b) judgment, arguing that providing a mental health program "fulfills its obligations according to the [Enabling Act], freeing the grant lands for other public purposes." (App. B at 5). Original Class Counsel cross-appealed "the trial court's failure to rule the [1978 redesignation] legislation invalid." (App. B at 4). At oral argument on appeal, Original Class Counsel, who as a legislator had personally voted to abolish the Trust, explained his concession, which gave away the bulk of the class' claims via the set-off, as follows:

> Frankly, I think that it's arguable under the law of private trusts that we wouldn't have to give the credit but I think it's fair, and that's the reason we made the stipulation.

(Tr. II at 33, emphasis added).

The Alaska Supreme Court ruled that the "redesignation" of Trust lands constituted a breach of the State's fiduciary duty under the Enabling Act in *State v. Weiss*, 706 P.2d 681 (Alaska 1985), hereinafter referred to as *"Weiss I."* (App. B at 6). The

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[3] The designation "WIR" is reference to the *Weiss I* record on appeal in the appeal and cross appeal of the Rule 54(b) Judgment, and Petitioner Nanuwak's appeal of the denial of her motion to intervene.

credit (or "set-off") was then accepted without analysis as part of that court's October 4, 1985, remand "guidance" regarding calculation of damages in *Weiss I*:

> We take this opportunity to provide some guidance to the trial court to simplify its task.
>
> * * *
>
> To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution.

(App. B at 7-8). After the remand under *Weiss I*, Original Class Counsel withdrew and Mr. David T. Walker, Esq., of Juneau, Alaska became counsel for the original plaintiffs. (App. C at 9 n.9).

Petitioner Nanuwak had also appealed the denial of her motion to intervene, citing as examples of inadequate representation Original Class Counsel's running of the case without consultation with any class members and that he had conceded to the State via the stipulation the dissipation of the Trust's *corpus* through the set-off. (SC at 244-45, 249).[4] In an unpublished Alaska Supreme Court Order dated January 24, 1986, Petitioner Nanuwak, "on behalf of themselves and all others similarly situated," was permitted to intervene "in future proceedings." (Exc. at 54, as clarified at Exc. 62). Based on this, the trial court permitted Petitioner Nanuwak's intervention, "only insofar [as their claims] relate directly to the reconstitution of the trust under [*Weiss I*]." (Exc. at 61). Petitioners Weiss and Nanuwak have

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[4] The designation "SC" is to proceedings in the Alaska Supreme Court of the appeal and cross appeal of the Rule 54(b) Judgment, and Petitioner Nanuwak's appeal of the denial of her motion to intervene.

worked very closely together since Mr. Walker began representing Petitioner Weiss and are joining in the Petition.

Following *Weiss I*, most of the parties' efforts on remand were spent negotiating and attempting to implement two proposed settlements, both of which the State later withdrew from prior to approval. (App. C at 12, *et seq.*). The first such settlement, enacted in 1987 as Chapter 48 Session Laws of Alaska 1987 (Chapter 48), provided that the State would "rent" the Trust's land for 8% of its value (re-determined every five years) and established the Interim Mental Health Trust Commission to formulate the procedures for determining the value. (App. C at 12-13).

At that point, Respondents Bosel, *et al.*, anticipating a huge income stream going into the Trust for the "mental health program," intervened as plaintiffs to "assure adequate representation of the developmentally disabled who were potential members of the class" and sought to have "the mentally retarded and mentally defective individuals be declared to be among the intended beneficiaries of the trust and members of the class."[5] (App. C at 10). By Order dated March 31, 1987, Respondents Bosel were "granted leave to intervene as parties plaintiff," but were not designated class representatives. (Exhibit 4 to October 4, 1996, motion for reconsideration of the Alaska Supreme Court's September 26, 1996, order).

Seeing the same funding source, Respondents H.L., *et al.*, "sought to intervene [as plaintiffs] 'to assure better representation of the class' and to assure that the relief obtained in this action reflects the needs and characteristics of [Chronic Alcoholics with Psychosis].'" (App. C at 10). By Order dated June 1, 1987, Respondents H.L. were "granted leave to intervene as parties plaintiff," but were not designated class representatives. (Exhibit 3 to October 4, 1996, motion for reconsideration of the Alaska Supreme Court's September 26, 1996, order).

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[5] Counsel for Bosel had been notified by counsel of record here in 1984, at the time of Petitioner Nanuwak's motion to intervene, that their interests might be at stake in the litigation but they chose not to participate at that time. (R. at 6907).

No one disputed that Chronic Alcoholics with Psychosis were entitled to the benefits of the Trust, but the entitlement of the mentally retarded and defective and the right of the State to add beneficiaries to the federally created Trust were disputed by Petitioner Nanuwak.

> These plaintiffs argue that Congress deliberately excluded the mentally retarded and mentally defective from receiving benefits under the trust. The primary focus of [these plaintiffs'] argument is that the State may not remove beneficiaries from nor add beneficiaries to those intended by Congress.

(App. D at 3). On April 27, 1988, the trial court ruled that both groups were beneficiaries and that "it is within the discretion of the State to include other groups as recipients of services by the mental health program." (App. D at 13, incl. n.6).

On April 17, 1990, the State notified interested parties that it "refused to follow the [Interim Mental Health Trust] Commission's procedures for determining fair market value." (App. C at 13). "After the impasse in the Chapter 48 process was reached, [on July 9, 1990] plaintiffs obtained a preliminary injunction prohibiting the State from taking any further action on mental health lands." (App. C at 13). On August 6, 1990, Respondent Usibelli Coal Company, a coal lessee of Trust Land moved to intervene "for the dual purpose of seeking necessary and appropriate relief from the court's preliminary injunction and for obtaining a declaration that Usibelli's third party rights are valid." On August 22, 1990, Respondent Idemitsu Alaska, Inc., another coal lessee of Trust Land moved to intervene as a defendant and for relief from the preliminary injunction. On April 7, 1991, Idemitsu was permitted to intervene as a defendant "for the sole purpose of seeking relief from the preliminary injunction."

The State and Petitioners then negotiated and submitted to the trial court for preliminary approval the April 6, 1992 Settlement Agreement that (a) required management of the Trust "solely in the best interests of the beneficiaries," and (b) would

have reconstituted the Trust with as much of its original endowment as possible and replacement of the rest with land of equal value and income earning potential. (Exc. at 289). This settlement represented a 100% recovery of the value and earning capacity of the original trust endowment. (Exc. at 289). However, certain "outside interests," including Respondents Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited were permitted to intervene to attack the "land based trust reconstitution." (App. C at 14-15, incl. nn.14 and 15). Respondents Marathon Oil Company and Union Oil Company of California were also allowed to intervene to challenge the "legality of transfer of the State's interest as lessor in oil and gas rights" to the Trust as part of that settlement. (App. C at 15).

Respondents H.L. opposed approval of this settlement, demanding a cash-based rather than a land based trust. (R. at 871). "Although [Counsel] for Respondents Bosel signed the written [settlement] agreement on April 6, 1992, he formally withdrew his support for it in December 1992," and switched sides.[6] (App. C at 15).

The trial court found that the April 6, 1992 Settlement Agreement "appears to provide the class with as much, if not more, than could be obtained through trial," (Exc. at 385), and concluded that it constituted a "potentially reasonable and adequate remedy." (Exc. at 389). However, the trial court denied preliminary approval on December 30, 1993, because of concerns that the settlement would not work as planned and, if not, could be terminated. The trial court, nevertheless, *invited the parties to resubmit their agreement* if the problems the court found were corrected. (Exc. 392). Following this decision, David Walker, counsel for Petitioner Weiss, met with the then Alaska Attorney General and they both agreed that the problems identified by the court with the April 6, 1992 Settlement "could, as a technical

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[6] He is now the Executive Director of the Trust Authority created under the settlement which is the subject of this Petition.

matter, be easily corrected." (Exc. 544, ¶48). The Alaska Attorney General "indicated that it was his intention to pursue such corrections." *Id.* However, on January 5, 1994, after receiving a memorandum from a new Commissioner of the Department of Natural Resources regarding settlement negotiations, the Attorney General resigned, effective immediately. (Exc. at 544, ¶49).

The State's new regime then determined to enact legislation to reconstitute the Trust under their interpretation of *Weiss I*, that would take effect unless the State's settlement offer was accepted and approved by the trial court in a period of less than six months from its enactment. In the trial court's words:

> The State . . . pursue[d] a contingency plan by advocating two sets of [legislative] provisions, one for settlement and one for on-going litigation. The settlement provisions would become effective only if the case was dismissed by [December 15, 1994]. . . . These provisions and the deadline have been called 'cram-down' provisions by objectors to the settlement.

(App. C at 17). During the negotiations that occurred under the threat of this "cram-down" legislation, counsel for Respondents Bosel informed the beneficiaries that neither he nor counsel for H.L. thought that "pursuing the litigation would achieve anything for the beneficiaries." (Exc. at 551, ¶67). The State then negotiated the current "take it or leave it" settlement with counsel for Respondents H.L. and Bosel, rather than with Petitioners, when it appeared Petitioners would not accede to the State's demands. (Exc. at 561, ¶89).

Under the settlement they negotiated, which is now at issue, all dispositions of Trust land in breach of trust were ratified. (Sec. 41, Chapter 5 First Special Session Laws of Alaska 1994 reproduced at App. J at 1). Under this settlement, only land that no one else wanted was included in the Trust. (App. C at 94)("non-class interests appeared to have 'first pick' from original trust lands and the pool of potential substitute lands"). For example, leased coal land, generating approximately $1 million in

annual revenues was removed from the Trust because the coal lessees wanted it excluded. (App. C at 59 n.68). "The only reason to exclude these lands was the political power of the coal industry. Complete justice would have demanded their return to the trust." (App. C at 88 n.103). At final approval, the trial court acknowledged:

> Everyone agrees that the lands in the reconstituted trust under [the settlement] have a total value less than that of the original trust lands. The difference in value is compensated with [a] $200 million cash payment and establishment of the Trust Authority.

(App. C at 94).

A Trust Authority was created, but it was not given the power to manage the Trust's land. Instead, the Department of Natural Resources, which manages the state's other land, was given the authority to manage the reconstituted Trust Land under the "provisions of law applicable to other state land."[7] Alaska Statutes (AS) 38.05.801(b)(1). (App. J at 1). As partial compensation for the loss in the value of the Trust's *corpus* under the settlement agreement (but not the statute), the Trust Authority was promised the power to spend the Trust's income "without and free of further legislative appropriation." (App. C at 27, incl. n.34). When spending this income, the Trust Authority may spend the income on services "which supplement the state's basic mental health program," rather than the "necessary expenses" mandated in the Enabling Act. (Exc. at 707). This settlement was agreed to by Respondents H.L. and Bosel based explicitly upon their counsels' acceptance that the "set-off" stipulated to by Original Class Counsel and incorporated into *Weiss I* eliminated any effective remedy for the State's breach of trust. (2/10/97 Tr. at 26-27).

As pertinent here, Petitioners objected to the proposed settlement and related judgment because it:

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[7] This directive is subject to being managed consistent with the "trust principles imposed on the State by the Enabling Act."

(1) compared very unfavorably with a proper evaluation of the class' claims under federal law, (R. at 23737-23755),[8]

(2) violates federal law in that:

(a) the management scheme violates the duty of undivided loyalty to Trust beneficiaries, (R. at 23758-23761),

(b) it allows Trust funds to be spent on services other than "first for the necessary expenses of the mental health program," (R. at 23761-23762),

(c) it allows the State to add beneficiaries to the Trust who were not beneficiaries as determined by Congress, (*See* App. D at 3), and

(d) it designates mentally retarded and mentally defective individuals as beneficiaries, (*See* App. D at 3),[9]

and

(3) was the product of inadequate representation, including that:

(a) Original Class Counsel's stipulation to the set-off was an unauthorized and unwarranted concession of a major class claim, (R. at 23734-23735),

(b) counsel for H.L. and Bosel, who proposed the settlement, did so despite failing completely to develop information about the class' claims for mismanagement damages, which claims could total over $1 billion, (R. at 23809-23811),

(c) enforcement of federal rights under the Enabling Act was not the goal of H.L. and Bosel, (R. at 23769),

(d) H.L. and Bosel put third parties' interests ahead of the class', (R. at 23769-23771),[10]

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[8] The designation "R." is reference to the *Weiss II* record on appeal of the trial court's approval of the settlement at issue here.

[9] The objections to the State having the right to add beneficiaries and the inclusion of mentally retarded and defective individuals as beneficiaries were actually made in connection with the earlier proceedings resulting in the court's April 27, 1988 decision on the beneficiaries. (App. D). These decisions were incorporated into the settlement and became final at the same time the settlement was approved.

(e) counsel for H.L. and Bosel were not authorized to enter into the proposed settlement, (R at 23765-23768), and

(f) counsel for settling intervenors did not advise the beneficiaries who had been following the negotiations that they had dropped the "essential" requirement for settlement that it guarantee adequate funding of the mental health program. (R. at 23771).

In evaluating the merits of the class' claims in comparison to the settlement, the trial court concluded that neither the Alaska Supreme Court nor this Court were likely to review and reverse the Alaska Supreme Court's decision in *Weiss I* holding that, under federal law, Alaska could dispose of Trust assets contrary to the best interests of the beneficiaries and owe nothing because it had otherwise funded a mental health program (the setoff). (App. C at 63). The trial court also concluded, under federal law, that the Trust was unlikely to recover Trust Land disposed of in breach of trust. (App. C at 58-62).

In addition, after excluding evidence that mismanagement damages for the surface estate alone under federal law were over $700 million (Tr. XXI 724)("You asked for an opinion as to lost income opportunity costs. I sustained [an objection to] that. That will not come in"), and after ignoring testimony that damages for mismanagement of the mineral estate ran into the billions of dollars, the trial court refused to give the beneficiaries' mismanagement damages claim *any* value. (App. C at 63-65). The primary reason given was that they had never been seriously evaluated.

> [Petitioners] maintain that the plaintiff's claim for lost opportunity damages due to the State's mismanagement of the trust would more than nullify the setoff for state expenditures. *There has been no discovery done on this issue. There has been no attempt to litigate the issue.* This

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[10] As the trial court noted in its final approval decision: "Counsel for H.L. . . . argu[ed] that the court should consider the 'public interest' and the fairness of the settlement to all persons affected by it." (App. C-77).

> claim has largely been relegated to an occasional whisper from the back of the courtroom; *this claim has never played a central role in anyone's analysis of the case until the hearing on final approval.*

(App. C at 63, emphasis added).[11] The trial court then concluded that the mismanagement damages claim should also be given no value because they are difficult to prove and were subject to legal defenses such as the statute of limitations, waiver, the lateness of their assertion and the limitations the court had placed on the intervention of Petitioner Nanuwak. (App. C at 64-65).

The trial court did not address any of Petitioners' arguments and evidence regarding inadequacy of representation in granting final approval to the settlement. Instead, it found that counsel for H.L. and Bosel, "had sufficient experience and access to knowledgeable staff to represent the class adequately." (App. C at 89).

The Alaska Supreme Court affirmed this decision on May 2, 1997, in Opinion No. 4816, not yet reported, hereinafter referred to as "*Weiss II.*" (App. A). With respect to the "set-off," the Alaska Supreme Court held:

> [The trial court] reasoned that neither we nor the United States Supreme Court would be likely to review and reverse our decision in *Weiss [I]*. . . . [Petitioner] counters that our statement in *Weiss [I]* allowing the set-off was merely the product of a dubious and unauthorized stipulation made by plaintiff's original counsel.
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> * * *

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[11] It appears this statement is directed at Petitioners, but, as the trial court itself acknowledged, it was the *proponents' burden* to demonstrate the settlement fair. (App. C at 44). The statement is also incongruous as directed against Petitioners since the trial Court excluded and ignored Petitioners' expert evidence on mismanagement damages. And, of course, the hearing on final approval is the appropriate place for such an issue to be raised.

> In light of the provisions of the [Enabling Act], general trust principles, and our approval of a set-off in *Weiss [I]*, the superior court did not err in concluding that plaintiffs would face a significant risk that a set-off for the State's mental health expenditures 'has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold.' '

(App. A at 25, 27).

Weiss II agreed with the trial court that the Trust was not likely to be able to recover Trust land disposed of in breach of Trust to third parties:

> [The trial court] did not err in concluding that under the *bona fide* purchaser doctrine many if not most of these sales would be valid because the purchasers had neither actual nor constructive notice of any breach of trust.

(*Id.* at 19).

Weiss II also agreed with the trial court that the Trust was not likely to be able to recover Trust land taken by the State in breach of trust for its own non-trust purposes:

> [U]nlike the 1978 redesignation legislation, the State's transfer of land to legislatively designated areas or for the use of state agencies is 'a disposition of . . . trust lands for a specific use.' *Id.* [citing to *Weiss I* - App. B at 7] The State's action with respect to such land is thus similar to the action permitted under *University of Alaska*. The superior court therefore reasonably concluded that, under that case, the plaintiffs would face a high risk of not recovering this land through further litigation.

(*Id.* at 21).

Weiss II also affirmed rejection of the class' mismanagement damages claims:

> In light of [the trial court's] analysis, we hold that the superior court did not err in its evaluation of the plaintiffs' mismanagement claim.

(*Id.* at 29-30). The Alaska Supreme Court did not address Petitioners' argument that it was inadequate representation for settling counsel to concede the mismanagement claim without conducting any discovery or otherwise having any idea of the extent of the claim. (Pet. Br. at 96).[12]

Weiss II also affirmed the trial court's inclusion of the mentally retarded and mentally defective as members of the class:

> [The trial court] did not err in determining that Congress intended the developmentally disabled to be beneficiaries of the trust and hence members of the plaintiff class in this litigation.

(App. A. at 41).

Neither the trial court nor the Alaska Supreme Court addressed Petitioners' arguments that under federal law the State may neither add beneficiaries to those specified by Congress, nor use the Trust's income for "discretionary," "special," or "supplementary," programs rather than the "necessary expenses of the mental health program" specified by Congress. (Pet. Br. at 88-89).

The Alaska Supreme Court rejected Petitioners' argument that management of the Trust as general grant lands under the settlement violates the Enabling Act's requirement of undivided loyalty to the Trust and its beneficiaries. That court held that because the settlement also requires that the Trust's land be managed in accordance with the "requirements imposed by the Ena-

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[12] The designation "Pet. Br." is reference to Petitioners' opening brief to the Alaska Supreme Court.

bling Act," the settlement's provision that the Trust's land be managed as "other state land," did not violate the Enabling Act. (*Id.* at 33). The court then held that management of Trust Land for non-trust interests "is not necessarily incompatible" with the Enabling Act's requirements. (*Id.* at 33-34).

REASONS FOR GRANTING THE WRIT

1. The Alaska Supreme Court Seriously Misapplied Federal Law.

In approving the judgment of the trial court, the Alaska Supreme Court adjudicated the federal rights created under the Enabling Act in two ways. First, in approving the settlement as fair, it considered the class' federal claims very weak by relying on its own decision in *Weiss I* allowing the set-off. Second, it held that Trust implementation under the settlement's terms complied with the Enabling Act. In both ways, the Alaska Supreme Court's conclusions on federal law directly conflict with the rulings of this and the other courts considering the same legal issues.

In *Asarco v. Kadish*, 490 U.S. 605, 633 (1989), this Court stated that its "concern for the integrity of the conditions imposed by [the Arizona Trust Enabling Act] has long been evident." Petitioners respectfully suggest that this Court should have no less concern for the conditions imposed by the Alaska Mental Health Enabling Act. Here, the only possibility of a federal determination of these important federal rights is through *certiorari*.[13] Eight years ago, this Court reviewed a state court decision involving another federal trust land grant in order to "assure that the binding application of federal law is uniform and ultimately subject to control by this Court." *Id.* at 621-2. The same considerations of uniformity of application and control by this Court apply with equal force here. Petitioners urge this Court grant the writ because the federal rights were just as finally adjudicated and the most valuable of the Trust's land were just as effectively

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[13] Since the State of Alaska is the defendant, the 11th Amendment probably precluded bringing this case in federal court. *See Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 4540 (June 23, 1997).

stripped from the Trust as if the Alaska Supreme Court had approved such actions in a ruling on the merits.

A. Settlement Approval Rested Upon Grossly Erroneous Evaluations of the Class' Federal Rights.

The first question presented is whether erroneous determinations of federal rights in the context of a class action settlement vitiates the court's approval.

> Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. [citation omitted]

Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). That judgment here must be based on a proper assessment of the claims, which are all unquestionably federal questions because they involve rights under the federally created Enabling Act.

Federal courts review class action settlements to determine whether the trial court has properly assessed the class' claims. *See, e.g., In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 814-17 (3rd Cir. 1995), *cert. denied* 516 U. S. ___, 116 S.Ct. 88; *In Re: General Motors Engine Interchange Litigation*, 594 F.2d 1106, 1132 n.44 (3rd Cir. 1979). A state court's failure to do so is as much an affront to federal law as a decision rejecting such claims on the merits.

One critical federal legal issue decided incorrectly by the Alaska Supreme Court was that the Enabling Act allows diminution (invasion) of the Trust's *corpus*. *Weiss I* allowed such diminution in the value of the *corpus* via the set-off. In *Weiss II*, the Alaska Supreme Court made clear that it was allowing diminution of the value of the Trust's *corpus* in the amount of the State's *annual* appropriations for mental health services:

> [Petitioners] argue that the superior court should have interpreted *Weiss [I]* as endorsing his position that the State

has a duty to preserve the trust corpus against 'diminution.'

We disagree. The AMHEA provides that trust lands 'may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska.' AMHEA § 202(e). **The superior court reasonably interpreted this language as expressly permitting the State to fund mental health programs by selling trust assets.** Thus the trial court did not err in reasoning that the AMHEA probably does not require that the State preserve the corpus of the trust *in perpetuity*.

(App. A at 25-26, boldface emphasis added, italics emphasis in original). However, this precise question was answered to the contrary by Senator Jackson, as chairman of the subcommittee reporting the Enabling Act, on the floor of the Senate just before it was passed in its final form:

Mr. SMATHERS. Is it proposed that the land shall be sold to some private interests to pay for the mental institution?

Mr. JACKSON. The land may be sold. *The purpose* of granting 1 million acres *is the same as in all other similar grants* such as the public school land-grant program. The *income* from sales or leases will be used to support the mental health program in Alaska. The *income* will be held in trust for that purpose.

(102 Cong. Rec. 9761 (June 7, 1956), emphasis added).

The Alaska Supreme Court's reliance on the "as the legislature may provide" language is misplaced. As this Court has stated:

[T]he 'as the State legislature may direct' language is not inconsistent with the express restrictions set forth in the

> Enabling Act. . . . [T]his language is properly viewed as authorizing the States to regulate the methods . . . as long as [they] comply with the dispositional requirements set forth in the Enabling Act.

Asarco, *supra* at 490 U.S. at 631. The Alaska Supreme Court is plainly wrong in holding the State has no duty to preserve the Trust's *corpus* for income generation under federal law.

Even if invasion of the Trust's *corpus* were allowed, any such action by the legislature, as trustee, must be done with undivided loyalty to the Trust. *Lassen v. Arizona*, 385 U.S. 584, 467 (1967) (only those beneficiaries specified by Congress may profit from the trust); *Ervien v. United States*, 251 U.S. 41, 47 (1919) (Congress' enumeration of purposes, "is necessarily exclusive of any other purpose."); *Nat. Parks & Conservation Ass'n. v. Bd. of State Lands*, 869 P.2d 909, 918 (Utah 1994)("The duty of loyalty requires a trustee to act only for the benefit of the beneficiaries"); *Plateau Min. v. Utah Div. of State Lands*, 802 P.2d 720, 729 (Utah 1990)("The State's duty of loyalty to beneficiaries . . . includes the duty not to act in the interest of a third party"); *County of Skamania v. State of Washington*, 685 P.2d 576, 580 (Wash. 1984). Thus, even if the Enabling Act allows invasion of the *corpus* for particular purposes, such invasion is only permissible if made solely upon the basis that it is in the best interests of the Trust's beneficiaries.

The State of Alaska did not satisfy this requirement of undivided loyalty because at the time it took the land for non-trust purposes, it did not even acknowledge that it had <u>any</u> fiduciary obligations to the Trust, let alone make any determination that giving the land away or otherwise disposing of it was in the best interests of the beneficiaries. As the trial court found:

> The State did not treat these lands differently from other state land even before the redesignation legislation. DNR did not manage the lands proactively to produce income for the trust. The State did not even maintain separate accounting for trust revenues.

(App. C-64).

In approving the settlement incorporating the set-off ruling, the Alaska Supreme Court never addressed Petitioners' argument that even if invasion of the *corpus* is allowed, it can be done only based on undivided loyalty to the interests of the Trust's beneficiaries. (Pet. Br. at 43; 2/10/97 Tr. at 6-7). Instead, relying on *Weiss I*, the court concluded that the set-off "has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold'" in breach of trust (App. A at 27), such "sales" to include the State's placing over a third of the Trust's land in State Parks and other conservation units (App. A at 21), and giving Trust Land away to municipalities. (App. A at 22). In other words, *Weiss I* as interpreted by *Weiss II* turns the paradigm of a trust *corpus* being used to generate income on an on-going basis on its head. Instead, the Alaska Supreme Court has established new law for federal land trusts in which such lands taken by a state for non-trust purposes can remain the property of the State (through reducing the Trust *corpus* permanently) if the state makes *annual* expenditures to fund a program. The set-off is unprecedented and unwarranted, and should be reversed by this Court.

Even if the "set-off" were allowed under federal law, there are other highly valuable claims that were improperly rejected. Thus, the settlement should also have been rejected because the Trust is entitled to recover (a) land disposed of in breach of trust, and (b) damages for mismanagement that equal or exceed the amount of money the State has spent on its mental health program.

Weiss II is contrary to the uniform authority that a federally created land trust is entitled to return of property disposed of in breach of trust. *Contra Asarco*, *supra* 490 U.S. 605 (affirming *Kadish v. Arizona State Land Dept.*, 747 P.2d 1183 (Ariz. 1987)); *City of Sierra Vista v. Babbitt*, 633 P.2d 333 (Ariz. 1981); *Arizona State Land Dept. v. Superior Court*, 633 P.2d 330 (Ariz. 1981); *Gladden Farms, Inc., v. State*, 633 P.2d 325 (Ariz. 1981); *Murphy*, *supra* 181 P.2d 336; *Propst v. Nebraska Bd. of*

Educational Lands, 55 N.W.2d 653 (Neb. 1953); *State v. Cooley*, 56 N.W.2d 129 (Neb. 1952); and *State ex rel. Ebke v. Board of Educational Lands and Funds*, 47 N.W.2d 520 (Neb. 1951).

Conflicting with this authority, *Weiss II* held the Trust would not likely recover its property conveyed in breach of trust:

> [The trial court] also did not err in concluding under the *bona fide* purchaser doctrine many if not most of these sales would be valid because the purchasers had neither actual nor constructive notice of any breach of trust.

(App. A at 19). This conclusion, however ignores that by virtue of the public notice of the Trust lands, no *bona fide* purchasers were even possible:

> The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. The title of the lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the 'support of common schools' with no right or power of the state to use, dispose of, or alienate the lands or any part thereof, except as allowed by the Enabling Act and the Constitution. *Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligation of the state.*

Propst, *supra* 55 N.W.2d at 657 (emphasis added).

In addition to the right to recover Trust property disposed of in breach of trust, the class had a multi-billion dollar claim for damages accruing from the State's admitted 30+ years of mismanagement. This mismanagement not only took the form of failing to account for the revenues received, but also failing to make the land productive. (App. C at 64). However, the Alaska Supreme Court affirmed the trial court's (a) refusal to hear expert testimony that mismanagement damages for surface use alone was over $700 million, (b) ignoring of evidence offered by Petitioners

that mismanagement damages for the mineral estate was over $2 billion, (c) holding that the Trust might not be entitled to mismanagement damages at all, and (d) refusing to give the claim any value because, *inter alia*, it had never been seriously evaluated by the proponents of the settlement. (App. A at 27-30).

The trial court gave the class' mismanagement damages no value because it concluded they were difficult to prove, and were subject to defenses such as the statute of limitations, waiver, the lateness of their assertion and the limitations the court had placed on the intervention of Petitioner Nanuwak, even though "there has been no discovery done" and "no attempt to litigate the issue." (App. C at 63). The Alaska Supreme Court affirmed, "in light of this analysis." (App. A at 29-30). The Alaska courts failed to recognize, however, that the Trust is entitled to mismanagement damages as a matter of *federal law*:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

United States v. Mitchell, 463 U.S. 206, 226 (1983). It was also clearly improper for the Alaska courts to foreclose a major federal claim, in a class action, potentially valued in the billions of dollars according to proffered testimony, after acknowledging it had not been the subject of factual or legal development.

B. The Judgment Approved by the Alaska Supreme Court Violates Federal Law.

Weiss II also erroneously approved implementation of the Trust via the settlement in ways which violate the Enabling Act. The management scheme for the Trust's land under the settlement violates the duty of undivided loyalty and the settlement allows the Trust's income to be spent on purposes not authorized by Congress.

The settlement approved by the Alaska Supreme Court in this case explicitly makes the *State's non-trust interests* one of the Trust's management objectives. In AS 38.05.801(b)(1) (App. J-1), Alaska Mental Health Trust Land is to be managed "under those provisions of law applicable to other state land." Alaska's general grant lands may be managed for multiple purposes, including scenic enjoyment, preservation or even to subsidize economic development. This clear violation of the duty of undivided loyalty was, however, held to be saved by the proviso that it is subject to "the trust principles imposed on the state by the Enabling Act." (App. A at 33); *see* AS 38.05.801(a) and (b).[14] However, as *Skamania*, *supra* 685 P.2d at 580, makes clear, even having competing goals is a violation of the duty of undivided loyalty. ("This divided loyalty constitutes a breach of trust"); *see also Dep't of State Lands v. Pettibone*, 702 P.2d 948, 954 (Mont. 1985) (statutory management scheme devaluing Montana School Trust Land invalid). Denial of *certiorari* in this case will encourage other states in their ongoing efforts to achieve more flexibility in their management of similar federally granted trust land in derogation of the purposes specified by Congress in those grants.

In addition to allowing the Trust land itself to be used for non-trust purposes, *Weiss II* approves the diversion of whatever money is made from the land from those purposes mandated by Congress by letting stand, without comment, the trial court's decision allowing the Alaska State Legislature to add to the beneficiaries specified by Congress. This dilutes the interests of the beneficiaries designated by Congress and is not allowed under federal law. *See*, *Lassen*, *supra* 385 U.S. at 466; *Ervien*, *supra* 251 U.S. at 47; *United States v. New Mexico*, 536 F.2d 1324, 1327 (10th Cir. 1976). This Court in *Rosado v. Wyman*, 397 U.S. 397, 423 (1970), citing *Lassen*, made clear that the determination of who is to receive the benefits of the Trust "is shaped by Congress, not the states." Petitioners respectfully suggest *certiorari* be granted to resolve this conflict and require compliance with federal law.

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[14] Reproduced at App. J-1.

The approved settlement similarly violates federal law by allowing the Trust's funds to be used to fund services "which supplement the state's basic mental health program" rather than for its "necessary expenses" as mandated by Congress. (Exc. at 707)(trial court decision granting preliminary approval). The settlement's allowance of Trust expenditures on "supplementary" expenses was specifically explained to be "extra" or "discretionary" services. It was specifically contemplated that under the settlement, the Trust's income could be used for these other purposes while "basic" or "necessary" mental health services were left unfunded. (Exc. at 550-51). As Petitioners pointed out in their opposition to final approval of the settlement:

> [T]he proponents say it is at least permissible for the Trust Authority to ignore the Core Beneficiaries who are being discharged to the streets, homeless shelters, dumpsters, soup kitchens and jails and spend the Trust's money on 'special projects' or 'enhancements.' . . . Under this regime, what are the Core Beneficiaries really getting in exchange for giving up their one million acres of the best land in the State?

(R. at 23747).[15] *Weiss II* failed to address this point raised by Petitioners in their opening brief at 89-91. If *certiorari* is denied, the benefits of the Trust will have been successfully diverted by the settling parties from the purposes Congress mandated.

The judgment approved in *Weiss II* also erroneously held that the mentally retarded and mentally defective are beneficiaries in contravention of the Enabling Act. (App. A at 41). The original House version of the Enabling Act included the mentally retarded and mentally deficient by including them in the definition of "mentally ill." (Exc. at 2-3). However, the Bill's manager in the Senate, disagreed that they should be included:

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[15] This provision demonstrates that the settling plaintiff intervenors were not representing those concerned with funding the "necessary expenses of the mental health program" for which the Trust was created.

> Senator JACKSON. I want to say, Congressman O'Brien, that that provision bothers me quite a bit. I think that the committee certainly is going to have to hear from the Department on the meaning of the words 'mentally retarded.' There are a lot of people who are mentally retarded that should not be under the provision of this bill.

(Exc. at 6). After a considerable amount of back and forth on the issue, including several attempts by the Executive Branch to include the mentally retarded and mentally defective, (Exc. at 7-22; R. at 6917-6921), the Senate passed the Enabling Act without the language to include them requested by the Executive Branch. Thus, the Senate specifically rejected including the mentally retarded and mentally defective, which was ultimately concurred in by the House. While funding programs for the mentally retarded and mentally defective is no doubt a laudable public purpose, Congress did not include them as beneficiaries of *this* Trust.

2. The Class' Due Process Rights Were Violated.

The judgment affirmed by the Alaska Supreme Court was also, fundamentally, the result of inadequate representation. Adequate representation is required to bind absent class members. *Hansberry v. Lee*, 311 U.S. 32, 61 (1940); *see also Phillips Petroleum Company v. Shutts*, 471 U.S. 797, 812, (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members").

The unauthorized set-off stipulation of Original Class Counsel is strikingly analogous to the stipulation that would not support a binding class judgment in *Hansberry v. Lee*. There, an untrue stipulation was executed by parties not aligned with the interests of the class. Here, without even discussing the matter with any class representative(s), Original Class Counsel, one of the legislators who voted to convert Alaska Mental Health Trust Land to General Grant Land in the first place, entered into an unwarranted stipulation allowing the State to reduce the value of

the Trust's *corpus* by the amount it spent on the mental health program even though he thought it was not supported by law. As in *Hansberry*, the class' interests were not being represented by the person entering into the stipulation.

In order for representation to be adequate in the class action context, other courts have held that *counsel's prosecution* of the class' claims must be "vigorous and tenacious." *Gonzalez v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973). In *In re: G.M. Pick-Up*, *supra* 55 F.3d at 801-804, the Third Circuit reversed a settlement where the circumstances suggested less than vigorous representation. In *In Re: G.M. Engine Interchange*, *supra* 594 F.2d 1106, the Seventh Circuit reversed a class action settlement where class counsel entered into unauthorized negotiations and where the extent of the class' damages were undetermined.

Here, Original Class Counsel voluntarily abandoned the class' claim to an affirmative monetary remedy and conceded a significant class defense worth hundreds of millions of dollars. In the settlement review calculus, according to the Alaska courts, this stipulated set-off "negated any cash recovery" no matter how much of the Trust's value had been disposed of in breach of trust. (App. A at 25-27). There was no compensation for this concession, it was not subjected to judicial scrutiny and it was unwarranted. Neither the trial court nor the Alaska Supreme Court addressed whether the stipulation was the product of adequate representation. Instead, the settlement based upon the set-off was approved because the Alaska Supreme Court agreed with the trial court that, as a "litigation risk," this Court was not likely to review and reverse the set-off approved in *Weiss I*. (App. A at 25). The inadequate representation of Original Class Counsel in stipulating to the set-off drove settling counsel to the unfavorable settlement here.

It was compounded by settling counsel's own inadequate representation in failing to evaluate a major class claim -- mismanagement damages -- that could have eliminated the set-off entirely. As he admitted at the fairness hearing:

> I am not suggesting by that that those claims haven't been made and that they don't exist and that they might be real. It's just that there's been no discovery to establish their size, the extent, the legitimacy of them . . .

(Tr. XXVI-751).

The Third and Seventh Circuits have unequivocally held that the trial court is required to consider whether the settlement is the result of adequate representation. *In re: G.M Pick-Up*, *supra* 55 F.3d at 801-804; *G.M. Engine Interchange*, *supra* 594 F.2d at 1124. *Weiss II* disagrees, instead holding that there is no requirement that the trial court make a finding of adequacy of representation. (App. A at 41, n.30)("[N]either that case [*In re General Motors Engine*] nor any other authority requires the trial court to make a specific finding that the class is adequately represented by counsel"). *Weiss II* goes on to hold that the trial court's consideration of the settlement negotiations would have met such a requirement in any event. (App. A at 41 n.30). The Alaska Supreme Court, however, failed to address how counsel negotiating the settlement could adequately represent the class without having any idea of the value of a major class claim, or any of the other instances of inadequate representation raised by Petitioners. Compounding the harm done here, is that the claims are federal claims and the inadequate representation further undermines Congress' scheme in creating federal rights.

While the Third and Seventh Circuits, at least, have required that the trial court stringently examine the adequacy of representation leading to a settlement and have enunciated standards, this Court has not yet done so. In the recent case of *Amchem Products, Inc., v. George Windsor,* No. 94-1474 at 20 n.20, 65 U.S.L.W. 4635 (June 25, 1997), this Court acknowledged that adequacy of representation necessarily involves the "competency and conflicts of class counsel," but declined to address the adequacy of counsel issues in light of its disposition of the case on other grounds. *See also*, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, n.13 (1982). Petitioners respectfully suggest that this case presents the perfect opportunity to

enunciate a Due Process standard for the adequacy of class counsel's representation; that Due Process demands, at the least, some understanding of all important class claims. Future class actions of all kinds require such guidance.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge their Petition for Writ of *Certiorari* be granted.

Respectfully Submitted,

James B. Gottstein*
Bruce A. Moore
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D. C. 20009
(202) 588-1000

David T. Walker
417 Harris Street
Juneau, Alaska 99801
(907) 586-3537

Barry S. Rosen
30 South Wacker Dr., 29th Floor
Chicago, Illinois 60606-7484
(312) 207-1000

Counsel for Petitioners
*Counsel of Record

S. Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

VERN T. WEISS, *et al.*,

Petitioners,

v.

STATE OF ALASKA, *et al.*,

Respondents,

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

James B. Gottstein*
Bruce A. Moore
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D. C. 20009
(202) 588-1000

David T. Walker
417 Harris Street
Juneau, Alaska 99801
(907) 586-3537

Barry S. Rosen
30 South Wacker Dr., 29th Floor
Chicago, Illinois 60606-7484
(312) 207-1000

Counsel for Petitioners

*Counsel of Record

220pp

APPENDIX

to

WEISS, *et al.*, Petitioners

v.

STATE OF ALASKA, *et al.*, Respondents

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Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, telephone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

VERN T. WEISS, father and next friend of CARL WEISS, on behalf of himself and all others similarly situated; and MARY C. NANUWAK and BILLY R. CROSS, on behalf of themselves and all others similarly situated,

Appellants,

v.

STATE OF ALASKA, ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Appellees.

Supreme Court No. S-6845
Superior Court No. 4FA-82-2208 CI

OPINION

[No. 4816 - May 2, 1997]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Mary E. Greene, Judge

Appearances: David T. Walker, Law Offices of David T. Walker, Juneau, and James B. Gottstein and Bruce A. Moore, Law Offices of James B. Gottstein, Anchorage, for Appellants. Brian D. Bjorkquist and Nathaniel B. Atwood, Assistant Attorneys General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, Julian L. Mason and William S. Cummings, Ashburn & Mason, Anchorage, and G. Thomas Koester, Law Office of Thomas Koester, Juneau, for Appellee State of Alaska. James H. Parker, Disability Law Center of Alaska, Anchorage, for Appellees Bosel, Doulin, Goodwin and Mayoc. Philip R. Volland, Rice, Volland, Taylor & Hensley, P.C., Anchorage, for Appellees H.L., M.K. and Alaska Addiction Rehabilitation Services.

Before: Compton, Chief Justice, Rabinowitz, Eastaugh, and Fabe, Justices. [Matthews, Justice, not participating.]

FABE, Justice.

I. INTRODUCTION

Vern T. Weiss et al.[1] (Weiss) appeal from the superior court's approval of an agreement settling a class action lawsuit concerning the lands granted to Alaska under the Alaska Mental Health Enabling Act, Pub. L. No. 84-830, § 202, 70 Stat. 709, 711-712 (1956) (AMHEA). The settlement agreement, reached after almost a decade of negotiations, reconstitutes the trust with

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[1] Mary C. Nanuwak also joins this appeal. Billy R. Cross appeals from the superior court's denial of a motion to substitute him as a named plaintiff-intervenor for John Martin after Martin died in 1994.

land and cash and establishes institutional mechanisms to protect the trust and improve mental health programs. For the reasons set forth below, we conclude that the superior court did not err in determining that the agreement represents a fair, adequate, and reasonable settlement of this litigation.

II. FACTS AND PROCEEDINGS

A. The 1956 Act, the Redesignation Legislation, and *State v. Weiss*

We summarized the facts and proceedings in this case prior to 1985 in State v. Weiss, 706 P.2d 681 (Alaska 1985):

> In 1956 the United States Congress passed the Alaska Mental Health Enabling Act (AMHEA) which, insofar as it concerns this case, granted the Territory of Alaska one million acres of federal land to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska. Pub. L. No. 84-830, 70 Stat. 709 (1956). Section 202(e) of the Act specifically provides:
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> > All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased,

> mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

The state managed these lands without maintaining a separate account until 1978. The Alaska State Legislature made its practice law in 1978 when it passed the following statutory provision:

REDESIGNATION AND DISPOSAL OF MENTAL HEALTH LAND

> (a) Land granted to the state under the Mental Health Enabling Act of 1956, 70 Stat. 709, and patented to or approved for patent to the state on July 1, 1978 and land designated as mental health land which was received by the state in exchange for land granted under that federal land grant is redesignated as general grant land and shall be managed and disposed of by the Department of Natural Resources under applicable provisions of law.

Ch. 181, § 3(a), SLA (1978).

Alaska has provided continuous mental health care since statehood. . . .

> Weiss et al. filed a class action in 1982 alleging that the state breached the public trust by 1) failing to account for revenues realized, 2) using revenues for purposes other than mental health care and 3) passing legislation redesignating the property "general grant land." Plaintiffs sought declaratory relief invalidating the redesignation legislation; injunctive relief compelling the state to administer the trust according to the law; general relief establishing a trust account "for the receipt of funds generated from all lands selected by the State of Alaska under the aforesaid mental health land grant. . . ."

State v. Weiss, 706 P.2d at 681-82.

The superior court agreed with plaintiffs that the State breached its duties as trustee by removing the federal grant lands from the trust. Id. at 682. However, the trial court ruled that it could not invalidate the 1978 redesignation legislation. Id. Instead, it ordered the State to pay fair market value and interest for all lands conveyed from the trust, including the lands redesignated general grant lands. Id. The superior court also ordered a set-off against this payment "for all monies spent by the state on mental health care." Id.

On appeal, we affirmed the lower court's ruling that Congress created a trust under the AMHEA and that the State breached its duties as trustee. Id. at 683. As a remedy for this breach, we invalidated the redesignation legislation and remanded the case to the trial court to reconstitute the trust "to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." Id. at 684. We also provided the trial court with the following guidance:

> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have

> been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

Id. at 684. We left open, however, "questions regarding the title held by conveyancees and bona fide purchasers of mental health lands." Id. at 684 n.4.

At the time of our decision in Weiss, only about thirty-five percent of the original trust land remained in state ownership and unencumbered. The State had conveyed about 90,000 acres to private individuals and municipalities and had designated more than 350,000 acres for parks, forests, wildlife areas, and similar uses.

Upon remand, we permitted the Alaska Mental Health Association (AMHA) et al.[2] (collectively, AMHA Intervenors) to intervene. The AMHA Intervenors added claims seeking to invalidate many of the State's conveyances of trust land to third parties.

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[2] Mary C. Nanuwak and John Martin joined AMHA's complaint.

B. Chapter 48 and Chapter 210

The legislature established the Interim Mental Health Trust Commission (Trust Commission) in 1986. Ch. 132, SLA 1986. It gave the Trust Commission the power to approve proposals for the sale, lease, or exchange of mental health trust land and to make recommendations for resolving the litigation. See Ch. 132, §§ 2(c), 4, SLA 1986.

One year later, based on discussions among all parties, the legislature attempted to settle the litigation by adopting Chapter 48, SLA 1987 (Chapter 48). Chapter 48 directed the commissioner of natural resources to establish the fair market value of the original trust lands under procedures approved by the Trust Commission. Ch. 48, § 4(a), SLA 1987. Once the Trust Commission established the fair market value of the lands, the commissioner, with the approval of the Trust Commission, was to select a combination of original trust lands and lands within legislatively designated areas with a fair market value equal to that of the original trust. Ch. 48, § 4, SLA 1987. The State would then compensate the trust for its use of these lands by paying it a "rent" of eight percent of the fair market value. Ch. 48, § 2, SLA 1987. Chapter 48 also provided that, until the fair market value of the trust land was established, the State would pay the trust five percent of unrestricted general fund revenues annually. Ch. 48, § 11, SLA 1987. Finally, the legislation created the Alaska Mental Health Board to determine the needs of persons to be served by the mental health program and to transmit recommendations for services and funding to the governor and legislature. See Ch. 48, § 6, SLA 1987.

During enactment of Chapter 48, other plaintiff groups moved to intervene in the action. The superior court permitted

Anita Bosel et al.[3] (Bosel Intervenors) to intervene on behalf of developmentally disabled individuals,[4] and H.L. et al.[5] (H.L. Intervenors) to intervene on behalf of chronic alcoholics with psychoses. AMHA and Weiss opposed the addition of the Bosel Intervenors. After an examination of the legislative history of the AMHEA, the superior court in 1988 concluded that Congress intended to benefit developmentally disabled individuals as well as those suffering from a psychiatric illness who may require hospitalization (Beneficiary Decision). The superior court also concluded that beneficiaries of the trust included chronic alcoholics suffering from psychoses and senile individuals who suffer major mental illnesses as a result of their senility.

In December 1989 two of the three members of the Trust Commission estimated the fair market value of the original trust lands to be $2.243 billion. The third member, the delegate of the commissioner of natural resources, rejected this figure and estimated the value of the original trust lands to be about $565 million. In response to these conflicting valuations, the commissioner of natural resources declared an "impasse" and refused to implement Chapter 48. In 1990 the legislature enacted a different proposal under which the State would pay six percent of unrestricted general fund revenues annually to the trust. Ch. 210, § 2, SLA 1990. This solution, which avoided the issue of the fair market value for the original trust land, foundered due to opposition by plaintiffs who feared revenues would fall.

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[3] Frances Doulin, Sharon Goodwin, and Gabriel Mayoc also joined in Bosel's complaint.

[4] We use the term "developmentally disabled" to refer to those individuals labeled "mentally retarded" and "mentally defective" in early versions of the AMHEA and in the record.

[5] M.K. and Alaska Addiction Rehabilitation Services joined in H.L.'s motion to intervene.

During this period of negotiations, the State continued to convey original trust land. However, after the failure of Chapter 48, the plaintiffs obtained a preliminary injunction prohibiting the State from transferring trust lands or any interest in trust lands pending final resolution of the litigation. In addition, the plaintiffs refiled lis pendens on all original trust lands.[6] The injunction and lis pendens affected thousands of land transactions.

C. Chapter 66

At the end of the 1991 legislative session, the legislature again attempted to settle the litigation by enacting Chapter 66, SLA 1991 (Chapter 66). Chapter 66 established a procedure to reconstitute the mental health land trust entirely through a land exchange. Under its provisions, the trust would retain much of its original holdings, and plaintiffs would be allowed to nominate replacement land of equal value from other state land. Chapter 66 also created a new agency, the Alaska Mental Health Trust Authority (Trust Authority), to act as trustee. Ch. 66, § 10, SLA 1991. The proposed settlement incorporating Chapter 66 was signed by the State and three of the four attorneys representing the plaintiffs, but the legality of the settlement was challenged by intervenors representing development and environmental interests. In addition, the H.L. Intervenors opposed the settlement, alleging improprieties in the negotiations.[7]

On December 30, 1993, the superior court denied preliminary approval of the Chapter 66 settlement. The superior court found that, because "either party may terminate the agreement at any time for any reason," the settlement was

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[6] The plaintiffs originally filed a notice of lis pendens on all original trust land prior to our decision in Weiss. This notice was expunged by the superior court on November 15, 1984.

[7] Although the Bosel Intervenors joined the agreement, they later withdrew their support.

seriously deficient and could not be approved without modification. Following this ruling, the State informed the parties that it did "not intend to implement the reconstitution provisions of Chapter 66." Instead, the State moved forward with a new approach to ending the litigation.

D. HB 201

After renewed negotiations between the parties, the legislature enacted the core of the settlement now before us in a special session following the regular 1994 legislative session. Ch. 5, 6, FSSLA 1994. Known as HB 201, the legislation returned about 568,000 acres of original land to the trust and designated approximately 353,000 acres of other state land as substitute trust land. The reconstituted trust now includes about 435,000 acres held in fee, 55,000 acres of mineral estate, and 78,500 acres of oil and gas interests from the original trust corpus. Other state land placed in the trust includes 111,000 acres held in fee, 217,000 acres of mineral estate, and 25,000 acres of oil and gas interests. The entire reconstituted trust consists of about 930,000 acres.

HB 201 provides for a special unit in the Department of Natural Resources (DNR) to manage trust land. AS 44.37.050. The settlement requires DNR to manage the land "consistent with the trust principles imposed on the state" by the AMHEA. AS 38.05.801. In addition, DNR must manage the land "under those provisions of law applicable to other state land" and adopt regulations that "at a minimum" address: "(1) maintenance of the trust land base; (2) management for the benefit of the trust; (3) management for long-term sustained yield of products from the land; and (4) management for multiple use of trust land." AS 38.05.801(c).

The settlement also provided for a payment by the State of $200 million in cash. Ch. 6, FSSLA 1994. This cash payment, proceeds from the sale of trust land, and other proceeds attributable to principal are retained perpetually in the mental

health trust fund and invested by the Alaska Permanent Fund Corporation. AS 37.14.031-.035. The income from the fund, the land, and other assets is deposited in the mental health trust settlement income account. AS 37.14.036. The Trust Authority may use this income account to award grants and contracts to ensure an integrated mental health program, obtain grants and gifts for that purpose, pay the Department of Natural Resources and the Alaska Permanent Fund Corporation for managing trust assets, offset the effect of inflation on the value of the principal of the trust, and pay its administrative expenses. AS 37.14.041.

HB 201 also requires the Trust Authority to make recommendations on mental health spending to the governor and legislature. AS 47.30.046. The appropriation bill submitted by the governor and the appropriation bill passed by the legislature must be limited to the mental health program. AS 37.14.003(a) & .005(b). The bills must be accompanied by reports explaining any differences between the appropriations they contain and the Trust Authority's recommendations. AS 37.14.003(b) & .005(c). In addition, the governor must explain any vetoes of appropriations for the mental health program "in light of" the Trust Authority's recommendations. AS 37.14.003(c).

The legislature made portions of the settlement contingent on dismissal of the litigation on or before December 15, 1994. Ch. 5, §§ 48-51, FSSLA 1994. If the superior court had not approved the settlement and dismissed the suit on or before that date, the trust would have been reconstituted with only the lands included in the settlement agreement; the provisions for payment of $200 million, establishment of the Trust Authority, and the special budgeting procedures would not have taken effect. Id.

The State and the H.L. and Bosel Intervenors (collectively, Proponents) supported HB 201, while the AMHA Intervenors and Weiss opposed it. After a four-day evidentiary hearing, the superior court gave preliminary approval to the HB 201 settlement on July 29, 1994.

In granting preliminary approval, the superior court noted several problems with the settlement that might have precluded final approval. Some of these were addressed by a second special session of the legislature. Chs. 1-2, SSSLA 1994. The legislature amended the settlement to allow for the provisions of HB 201 to go into effect even if some members of the class appealed final approval after the December 1994 deadline. Ch. 1, § 2, SSSLA 1994. It also modified the list of lands incorporated into HB 201 to avoid title problems and include more valuable lands. Ch. 1, §§ 4-7, SSSLA 1994. Finally, it gave assurance that the trust would receive the full $200 million in cash even if the State could not sell certain lands for the amount stated in the legislation. Ch. 2, §§ 4-5, SSSLA 1994.

After reviewing comments and conducting another evidentiary hearing on the fairness of the settlement, the superior court issued final approval of the HB 201 settlement on December 6, 1994. Weiss appeals.[8]

III. DISCUSSION

A. Standard of Review

In reviewing the superior court's approval of a class action settlement pursuant to Alaska Rule of Civil Procedure 23(e),[9] we adopt the same abuse of discretion standard applied under the federal rule, 7B Charles A. Wright et al., Federal

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[8] Earl Hilliker, an original plaintiff, and AMHA opposed the settlement but are not participating in this appeal.

[9] Rule 23(e) provides:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Practice and Procedure § 1797.1, at 394 (1986), and in our previous cases concerning settlement agreements. E.g. Barber v. Barber, 837 P.2d 714, 716 n.2 (Alaska 1992). We review the superior court's findings of fact under the clearly erroneous standard. Id.

B. Did the Superior Court Err in Ruling that the Settlement Agreement Is Fair, Adequate, and Reasonable?

In granting final approval, the superior court properly focused on determining whether the settlement as a whole was fair, adequate, and reasonable. The superior court listed seven factors to consider in making this determination:

> (1) comparison between the likely result of litigation and the remedy in the settlement;
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> (2) expense, complexity, and likely duration of further litigation;
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> (3) reaction of the class to the settlement, number of objectors, and nature of objections;
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> (4) experience and views of counsel;
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> (5) defendant's ability to pay (feasibility of settlement);
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> (6) extent of discovery completed; and
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> (7) presence of collusion in settlement negotiations.

This list of factors, drawn from federal precedent, provides a framework for thorough analysis. See Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992); Manual for Complex Litigation, Third § 30.42 (1995); 2 Herbert B.

Newberg & Alba Conte, Newberg on Class Actions § 11.43, at 11-97 (3d ed. 1992).

The bulk of Weiss's arguments concern the fairness of the settlement; he argues, in short, that it is a "bad deal." As the United States Supreme Court has stated, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement."[10] Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). Thus, the focus of Weiss's challenge is the superior court's analysis under the first factor above: the comparison between the likely result of litigation and the remedy in the settlement. In making this comparison, a court should attempt to determine

> a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion - and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972).[11]

The superior court determined that the HB 201 settlement "provide[d] the class with five primary benefits." These included

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[10] In addition, neither the superior court in considering the settlement nor this court in reviewing it "decide[s] the merits of the case or resolve unsettled legal questions." Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981).

[11] We remanded for an equivalent analysis in an appeal involving the proposed settlement of the claims of a minor under Alaska Civil Rule 90.2. In re Estate of Brandon, 902 P.2d 1299, 1310 (Alaska 1995).

reconstitution of the trust with $1.1 billion of original and replacement land, payment of $200 million, establishment of the Trust Authority, alteration of the budgeting process, and creation of a special DNR unit to manage trust land.[12] The superior court compared these benefits to what it determined would be the likely result of continued litigation: a trust composed solely of between $1.2 and $1.5 billion worth of land. It reasoned that, because the set-off for the State's mental health expenditures permitted under Weiss would probably exceed the value of the payment for lands removed from the trust, further litigation would not result in any cash payment to the trust. It also concluded that continued litigation would not result in any Program Benefits.

Weiss challenges this comparison, arguing in essence that the superior court erred both by overvaluing the settlement and undervaluing the probable outcome of continued litigation.

1. Land value

The settlement provides for the trust to be reconstituted with both original trust land and substitute land. The superior court, for purposes of comparison, valued the combination of original trust land and substitute land in the HB 201 settlement at $1.1 billion. The court then compared this value with the value of the original trust lands without the land that would probably not be returned to the trust after further litigation. Considering the outcomes of both highly successful and unsuccessful litigation, the superior court determined that the value of the land returned to the trust after final judgment would be between $1.16 billion and $1.53 billion.

Weiss argues that the superior court erred in two general ways: (a) it undervalued original trust land and overvalued

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[12] The latter three are referred to collectively as the "Program Benefits."

settlement land; and (b) it incorrectly assessed the risks of further litigation. The former involves primarily issues of fact regarding the various efforts to appraise the value of the lands at issue, while the latter centers on the nature of the trust established by the AMHEA.

a. Value of original trust and settlement lands

Weiss's arguments concerning the valuation of the original trust lands focus on the mineral values of those lands.[13] The starting point for the superior court's consideration of the mineral values was the testimony of Weiss's expert, Dr. Paul Metz. Dr. Metz estimated the mineralized lands to be worth between $1.3 and $1.5 billion, exclusive of coal and industrial minerals. The Proponents attacked this estimate through the testimony of four expert witnesses. Applying their "corrections" to Dr. Metz's work, these witnesses testified that the value of the mineral portion of the original trust lands was between $80 and $119 million, or approximately ten percent of Dr. Metz's estimate.

Considering this conflicting testimony, the superior court found that Dr. Metz "overstate[d] the true value of the mineral lands." It concluded that, although the settlement land "is not as valuable as the original mental health trust," the difference in value suggested by Dr. Metz's appraisal was not "a real dollar loss." This conclusion undercut Weiss's position in two ways.

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[13] Weiss also contends that the superior court erred in valuing the surface value of original trust lands by considering that "the time required to sell surface value original trust lands (called 'absorption') reduced the value to as much as one-tenth to one-fifth of [the lands'] stated value." The superior court, however, did not apply absorption or discount rates when establishing the value of original trust lands; it used the valuation of the land provided by Weiss's expert. Thus, this argument is irrelevant.

First, it suggested that the other benefits of the settlement, such as the $200 million in cash and the establishment of the Trust Authority, would be adequate compensation for land not returned to the trust. Second, it supported the superior court's conclusion that Weiss faced a "very high litigation risk" of proving that the State owed as much as he claimed for the lands it removed from the trust.

Weiss faults the superior court for failing to provide sufficient analysis of the expert testimony on mineral valuation and for ignoring rebuttal testimony. This argument is unpersuasive. The superior court specifically explained the analysis of each of the four experts critical of Dr. Metz's methodology. It also noted several of Dr. Metz's arguments in rebuttal. Contrary to Weiss's argument, the trial court's decision provides "a clear understanding of the ground on which the trial court reached its decision," Sloan v. Jefferson, 758 P.2d 81, 86 (Alaska 1988), and reflects a detailed analysis of both sides of the valuation issue.

Weiss also argues that the superior court erred by not accepting Dr. Metz's appraisal of the original trust lands. This argument fails for two reasons. First, the trial court in fact largely adopted Weiss's estimates in making its comparison between the settlement and the probable result of continued litigation, explicitly stating that the "valuations given by Dr. Metz are useful when comparing two groups of mineralized land." Second, a trial court does not err simply by finding the testimony of one witness more convincing than that of another. Evans v. Evans, 869 P.2d 478, 480-81 (Alaska 1994).

In arguing that the superior court overvalued the settlement lands, Weiss contends that, because only land "no one maintained an objection to was included" in the settlement, the "posited surface values should . . . be reduced" to a fraction of their stated value. However, Weiss never argued and no witness testified to the trial court that such a reduction should be applied only to lands included in the settlement. Thus the trial court did

not err by failing to reduce the value of the land as Weiss suggests.

b. Risks of continued litigation

In assessing the likely result of continued litigation with regard to land, the superior court divided the land in the original trust into categories and assigned each category a "litigation risk."[14] The categories in dispute are: (i) land held by third-party purchasers; (ii) municipality entitlements; (iii) legislatively designated areas (LDAs) and lands transferred to other state agencies; and (iv) pre-1978 disposals.[15]

i. Third-party purchasers

The superior court concluded that the litigation risk of recovering land purchased by third parties would be very high. It reasoned that the land conveyed to third parties would probably be considered "sold" under Weiss. It also determined that, because most of the purchasers did not buy the land with knowledge of the breach of trust, these sales would probably be

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[14] In evaluating this risk, the superior court focused on the probability that plaintiffs would be able to recover the land removed from the trust through further litigation. Under Weiss, the State would be liable to the trust for the fair market value of "sold" lands. Weiss, 706 P.2d at 684. As discussed below, however, any payment by the State for "sold" lands would be subject to the "set-off." Id. Therefore we, like the superior court, address the likely amount of such payment in connection with our discussion of the set-off and focus here on the likelihood that the trust would recover its original land grant.

[15] The superior court also determined that the litigation risk of recovering trust lands exchanged with the Cook Inlet Region Incorporated was "low." The parties do not dispute this finding. The superior court also briefly considered original trust lands that currently generate about $1 million a year in revenue from coal leases, concluding that these lands would "clearly return" to the trust in continued litigation.

upheld under basic principles of trust law.[16] The trial court further noted that such purchasers might also raise other valid defenses, such as the statute of limitations.

Weiss argues that this analysis is incorrect. He asserts that under "a long-standing per se rule . . . conveyances of federal trust lands in breach of trust are void, regardless of the actual state of knowledge of the conveyees." Weiss supports this position by citing cases from Nebraska and Arizona dealing with land granted by Congress to states for the purpose of supporting public schools.

This argument is not persuasive. The trial court reasonably interpreted Weiss as supporting the view that land transferred to third parties would be considered "sold" for purposes of reconstituting the trust. It also did not err in concluding that under the bona fide purchaser doctrine many if not most of these sales would be valid because the purchasers had neither actual nor constructive notice of any breach of trust.

Precedent relied on by Weiss involving school land trusts in Nebraska and Arizona does not contradict this conclusion. The holdings in those cases rely on the detailed procedures for disposal of trust land contained in the enabling acts and state constitutional provisions governing those land trusts. E.g. Gladden Farms, Inc. v. State, 633 P.2d 325, 327-30 (Ariz.

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[16] The superior court cited Restatement (Second) of Trusts § 284 (1959), which states:

> (1) If the trustee in breach of trust transfers trust property to, or creates a legal interest in the subject matter of the trust in, a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction, the latter holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary.
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> (2) In the Restatement of this Subject such a transferee is called a "bona fide purchaser."

1981); Murphy v. State, 181 P.2d 336, 353-54 (Ariz. 1947); State ex rel. Ebke v. Board of Educ. Lands & Funds, 47 N.W.2d 520, 522-23 (Neb. 1951). The AMHEA differs from these laws because it explicitly permits trust lands to "be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide." AMHEA § 202; see also State v. University of Alaska, 624 P.2d 807, 815 n.11 (Alaska 1981) (noting that the Nebraska Constitution specifically provides for a method of management and disposal of school lands, while the Alaska Constitution "has left these determinations to the legislature"). While we noted in Weiss that precedent involving school trust land supported our reliance on "basic trust law principles," Weiss, 706 P.2d at 683 n.3, this reliance does not imply that application of such principles yields the same result regardless of the nature of the trust at issue. The superior court properly applied basic principles of trust law under the specific terms of the AMHEA to determine that the plaintiffs would face a high risk of recovering land conveyed to many third-party purchasers.

ii. LDAs and land transferred to other state agencies

The superior court estimated that the litigation risk that the trust will recover land set aside by the legislature for other uses since 1978 would be "high." The court based this conclusion on its determination that, in accord with State v. University of Alaska, 624 P.2d 807 (Alaska 1981), these lands would probably be deemed "sold" under Weiss. Weiss argues that the term "sold" in Weiss does not refer to lands "still held by the State."

In University of Alaska, we considered a 1929 grant of 100,000 acres by the federal government to the Territory of Alaska for the "exclusive use and benefit" of the University of Alaska. 624 P.2d at 810-11. The State, without paying compensation, placed about 5,000 acres of the land into Chugach State Park. Id. at 809-10. We concluded that the State breached

the trust by redesignating the land, but declined to invalidate the State's action. Id. at 814-15. Instead, we held that the State must compensate the university for the land by paying it fair market value or by agreeing to a land exchange. Id. at 816.

In Weiss, we distinguished University of Alaska on the grounds that the 1978 redesignation legislation did "not involve a disposition of a portion of trust lands for a specific use" and therefore could not support an inference of legislative intent to pay for the trust land. Weiss, 706 P.2d at 684. However, unlike the 1978 redesignation legislation, the State's transfer of land to legislatively designated areas or for the use of state agencies is "a disposition of . . . trust lands for a specific use." Id. The State's action with respect to such land is thus similar to the action permitted under University of Alaska. The superior court therefore reasonably concluded that, under that case, the plaintiffs would face a high risk of not recovering this land through further litigation.

iii. Municipal entitlements

The superior court evaluated the litigation risk associated with recovery of original trust lands selected by municipalities under the municipality entitlement program, AS 29.65, as "medium." It based this conclusion partly on its evaluation of the argument that the transfers would be upheld under University of Alaska and partly on the fact that many of the lands have been resold to individuals who may be bona fide purchasers. Weiss argues that this finding is contradicted by City of Sierra Vista v. Babbit, 633 P.2d 333, 334 (Ariz. 1981), in which a sale of school trust land to a municipality was invalidated.[17] In contrast to the

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[17] Weiss also argues that the municipalities could not claim bona fide purchaser status since they did not pay value for the land. This argument, even if true, is irrelevant because the court did not base its finding on the bona fide purchaser status of the municipalities.

case before us, however, City of Sierra Vista relies on the specific requirement in the Arizona Enabling Act that school trust lands be sold to the "highest and best bidder." Id. Therefore, Weiss's reliance on this case is misplaced.

Weiss also argues that the superior court erred by including sales by municipalities to third-party purchasers in this category because those sales had already been considered by the court in its specific discussion of sales to third-party purchasers. However, the superior court's finding that the plaintiffs face a "medium" risk of recovering municipal entitlement lands through continued litigation is amply supported by University of Alaska regardless of whether such lands were resold to third parties.

iv. Pre-1978 disposals

The superior court evaluated the plaintiffs' risk of recovering lands disposed of prior to the 1978 redesignation legislation as "very high." The court reasoned that because "[n]othing in Weiss would require that they be included in the reconstituted trust,"[18] the "plaintiffs would have to prove a breach of trust or other invalidity other than the enactment of the redesignation legislation." It concluded that, under University of Alaska and the legislature's power under the AMHEA to dispose of trust lands, the plaintiffs would be unlikely to succeed in forcing the State to return this land. Weiss contends that the plaintiffs would have little difficulty in establishing that the pre-1978 transfers were in breach of trust.

The lands disposed of prior to 1978 include both purchases by third parties and land designated for other uses. As discussed above, the trial court reasonably found the risk of

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[18] We stated in Weiss that the goal on remand was "to restore the trust to its position just prior to the conveyance effected by the redesignation legislation." Weiss, 706 P.2d at 684.

recovering land in these two categories as "very high" and "high," respectively. This analysis applies with equal force to the pre-1978 disposals. Thus the superior court did not err in its evaluation of the risk with respect to recovering this category of land.

c. Summary of litigation risk with respect to land

In summary, the superior court did not err in concluding that the likely result of continued litigation would be a trust corpus including land worth between about $1.1 billion and $1.5 billion. Nor did the court err in estimating, for purposes of comparison, the value of settlement lands as about $1.1 billion. The superior court ably analyzed the complex land valuation issues in this case; its findings and conclusions are well supported by both the record and the relevant authority.

2. Cash

The superior court considered the settlement's $200 million "cash infusion" to be "extremely significant" because it assured "some income" for Trust Authority programs and because "it is real money in hand today." The trial court stated that "$200 million of mineral value may never produce $1 of income for the trust, because the mineral values are based on probabilities of discovery derived from extremely limited geophysical, geochemical, and geological data with no actual drilling." The superior court also stated that, based on calculations by an expert witness for the Proponents, $200 million in cash is equal to the net present value of the royalties from between $588 million and $6.3 billion in annual mineral production, depending on one's assumptions regarding cost of

production, discount rate, mine life, and delay in the start of production.[19]

Weiss complains that these comparisons led the trial court to overemphasize the value of the cash component of the settlement. He argues that the court's statement that $200 million in mineral value might not produce any income for the trust "represents a fundamental misunderstanding of the valuation process."

While Weiss is correct that mineral lands valued at $200 million could presumably be sold for $200 million "cash in hand," his argument misses the superior court's point that the capacity of the trust land to produce income is highly speculative. Contrary to Weiss's assertions, these comparisons and calculations were not presented as "one of the fundamental underpinnings" of the superior court's analysis, but merely as an "interesting" way to contrast the speculative value of the trust's land with the certain value of cash. The superior court did not err by observing this distinction or by illustrating it.[20]

3. The set-off

The issue of the set-off goes to the heart of the nature of the trust created by the AMHEA. In Weiss, we stated:

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[19] The $588 million figure is based on immediate production, a 10% discount rate, a mine life of 20 years, and a royalty payment of four percent of gross production. The $6.3 billion figure is based on a 10-year delay in production, a 20% discount rate, a mine life of 20 years, and a royalty stream of four percent of gross production.

[20] Weiss offers his own calculations purporting to show that the court's conclusions are "very far off the mark." These calculations, while mathematically correct, ignore the court's assumptions regarding start-up delay, discount rate, and mine life. Thus they do not provide a meaningful point of comparison.

> To the extent that former mental health lands have been sold since the date of the conveyance [redesignation legislation] the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution.

706 P.2d at 684. The superior court considered the "setoff . . . a very significant litigation risk" with the "potential to negate any cash recovery to the trust resulting from the State's obligation to pay for 'sold' land." It reasoned that neither we nor the United States Supreme Court would be likely to review and reverse our decision in Weiss. It also noted that the language of the AMHEA supports its assessment of the risk created by the set-off because it "appears to allow the proceeds of [land] sales to be used for the necessary expenses of the mental health program."

Weiss counters that our statement in Weiss allowing the set-off was merely the product of a dubious and unauthorized stipulation made by plaintiff's original counsel. Weiss argues that the making of such a stipulation amounted to "inadequate representation" by class counsel and that class members will therefore not be bound by the resulting settlement agreement.

Weiss's argument rests on the assumption that the set-off, at least as understood by the superior court, is an erroneous interpretation of Weiss and the AMHEA. Relying on our holding in Weiss that the State, by passage of the 1978 redesignation legislation, "breached its duty to preserve the corpus" of the trust, Weiss, 706 P.2d at 683, he concludes that we rejected the State's view that it had the power to spend trust principal to fund the mental health care program. He argues that the superior court should have interpreted Weiss as endorsing his position that

the State has a duty to preserve the trust corpus against "diminution."

We disagree. The AMHEA provides that trust lands "may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska." AMHEA § 202(e). The superior court reasonably interpreted this language as expressly permitting the State to fund mental health programs by selling trust assets. Thus the trial court did not err in reasoning that the AMHEA probably does not require that the State preserve the corpus of the trust in perpetuity. Nor is this reasoning contradicted by any duty under basic trust law principles. Trustees have a duty to preserve trust property for the uses of the trust,[21] but they do not necessarily have a duty to maintain the corpus of the trust forever.[22]

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[21] The Restatement (Second) of Trusts § 176 (1959), under the heading "Duty to Preserve the Trust Property," states: "The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." Comment b of § 176 further states that "[i]t is the duty of the trustee to use reasonable care to protect the trust property from loss or damage." Thus the duty to preserve the trust corpus does not prohibit the trustee from using the principal for the purposes of the trust. Indeed, trusts may allow the trustee to expend the principal of the trust for the support of the beneficiary, under specific terms of the trust, or at the trustee's discretion. See, e.g., Restatement (Second) of Trusts, §§ 153-55, 190 (1959).

[22] The school trust land cases do not compel a different result. As noted above, the enabling acts, constitutional provisions, and statutes governing many school trust lands, in contrast to the AMHEA, expressly require the state to preserve the corpus of the trust in an "'inviolate' permanent fund." Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 879 (1992). One possible benefit of the settlement is that it establishes such a permanent trust fund for the mental health trust. See AS 37.14.031. In view of the language of the AMHEA, it is unlikely that further litigation would achieve this result.

In light of the provisions of the AMHEA, general trust principles, and our approval of a set-off in Weiss, the superior court did not err in concluding that plaintiffs would face a significant risk that a set-off for the State's mental health expenditures "has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold.'"

4. The mismanagement claim

Weiss argues that even if the trial court correctly found that the set-off would exceed any cash recovery for lands removed from the trust, it erred by not adequately assessing the plaintiffs' claim against the State for damages from the State's alleged mismanagement of the trust. Weiss argues that, according to Restatement (Third) of Trusts, Prudent Investor Rule § 205 (1990), a trustee who commits a breach of trust is "chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Weiss concludes that the superior court erred by finding "significant risks" that damages from this mismanagement or "lost opportunity" claim would not exceed the set-off. He also argues that the superior

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Moreover, Weiss undercuts his own position that the State's duties with regard to the mental health trust are similar to the duties of other states toward school land trusts by arguing that the State breached its duty as trustee by failing to manage the trust's mineral lands so as to produce income to fund the mental health program. The use of royalties from nonrenewable resources to fund mental health programs would necessarily diminish the corpus of the trust. In recognition of this, states with school land trusts usually place mining royalties into permanent funds or use them to purchase additional trust land. See Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 879 (1992). Indeed, under the settlement agreement, "royalty proceeds" are placed in the permanent fund containing the trust's cash principal. AS 37.14.031(b)(2).

court abused its discretion by refusing to allow his expert to testify on the likely amount of mismanagement damages.

The superior court agreed with Weiss that "it is very likely that the plaintiffs could prove that the State mismanaged the trust." It found, however, that the plaintiffs would face significant risks both in proving damages in excess of the set-off and in overcoming potential legal defenses. This conclusion is well supported by both the relevant law and facts of this case. In this regard, the trial court stated:

> Lost opportunity damages are difficult to prove in any case unless there is an existing history of business activity or earnings. They would be extremely difficult to prove in this case.
>
> The most difficult area of proof concerns the mineral lands. Almost nothing is actually known about the mineral producing capacities of these lands. The lands were open for mineral development and staking for free from the time they were in state control until after the Supreme Court's decision in Weiss. Accordingly, the proof would center on what would have happened with proactive promotion of the lands. However, there is no appropriate comparative standard. Throughout this period no group in this state actively promoted mineral lands. Thus, it is hard to predict how the mineral industry would have reacted to active management. Even if the plaintiffs overcome this hurdle, they would have to prove how much money they would have earned from producing mines. Alaska has not had a very active metallic mineral industry, other than for the production of gold. There is a substantial risk that the plaintiffs would be left with speculative damages for which they could be awarded nothing.

> The easiest area to prove, lost opportunity damages concerning the surface lands, still poses litigation risks. There are proof problems there as well. The years from 1966 (when selections were largely completed) to 1978 were growth years for the state, but most of the growth occurred in the latter part of that period with the building of the Transalaska pipeline. The plaintiffs could have difficulty showing a market for lands before 1975.

The superior court also found that portions of the mismanagement claim were subject to several legal defenses putting "some if not all of the potential damages from the lost opportunity claim at risk." It noted that the plaintiffs either approved or did not object to many of the transactions between 1986 and 1990 approved by the Interim Mental Health Trust Commission. In addition, the preliminary injunction sought by plaintiffs has precluded the State from "permitting any activity on trust lands without court approval." Thus the trial court concluded that the State "could probably defeat most claims after 1986 based on waiver."

The superior court also found that the mismanagement claim might be barred by "limitations placed by the court on the intervention by AMHA." The mismanagement claim was added to this litigation by the complaint in intervention filed by AMHA after we issued our decision in Weiss. This court's order permitting AMHA's intervention stated that "counsel for AMHA declared its general satisfaction with the decision in Weiss, and its present desire only to participate in future proceedings in Weiss on the previously ordered remand thereof." Under this order, the trial court granted AMHA's request to file its complaint "only insofar as the Additional Claims relate directly to the reconstitution of the trust ordered by the Alaska Supreme Court" in Weiss. Referring to these orders permitting AMHA's intervention, the superior court stated that an "independent claim for damages may exceed that limitation." In light of this

analysis, we hold that the superior court did not err in its evaluation of the plaintiffs' mismanagement claim.

Weiss also argues that the trial court abused its discretion by refusing to allow Weiss's expert to testify on the likely amount of mismanagement damages. Our review of the transcript, however, reveals that the excluded testimony arose after a new attorney took over examination of the expert during direct testimony. As a condition for allowing the switch in attorneys, the court required the witness's further testimony to be within the scope of the prior testimony. The trial court did not abuse its discretion in ruling that the scope of the prior testimony did not include the calculation of damages due to the State's alleged mismanagement of the trust.

5. Program Benefits

In comparing the settlement with the likely result of continued litigation, the trial court considered three "primary benefits" in addition to land and cash. These benefits, collectively referred to as the "Program Benefits," include (a) the creation of the Trust Authority, (b) budgeting advantages for the mental health program, and (c) the management of trust land by a special unit within DNR. Weiss argues that the superior court overvalued each of these benefits.

a. The Trust Authority

The superior court found the Trust Authority to be a "fundamental and significant part" of the settlement agreement. Weiss argues that the benefit of the Trust Authority is largely "illusory" because its power to spend money from the trust income account without appropriation by the legislature is possibly unconstitutional. Weiss also contends that the power of the Trust Authority to oversee DNR's administration of trust lands is meaningless since DNR will have "the final say."

In granting both preliminary and final approval, the superior court recognized that the constitutionality of the Trust Authority's power to spend trust income without legislative appropriation was uncertain. Thus, contrary to Weiss's assertion, the superior court did not "just close its eyes" to this issue. Indeed, it would have been improper for the trial court to attempt to resolve this unsettled legal question. See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). Furthermore, the court based its finding as to the significance of the Trust Authority on "all its powers and its advocacy position," not solely on its spending power.[23] Thus the superior court, even while acknowledging Weiss's argument, came to a different conclusion as to the Trust Authority's value; this conclusion was not clearly erroneous. Weiss's second argument also fails. Again, the superior court recognized and accounted for the fact that, although the Trust Authority has the power to disapprove proposed land exchanges, DNR will ultimately decide how to manage trust land. See AS 37.14.009(a)(2).

Moreover, the superior court responded to both of these arguments with the observation that, without the settlement there "would be no Trust Authority." Instead, the likely result of litigation would be "general directions to the State to manage the trust in the interests of the beneficiaries and under the Enabling Act." The superior court did not err in determining that management under the Trust Authority will probably be better than "management with those directions."

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[23] The superior court emphasized its view of the importance of the Trust Authority's "advocacy position":

> The Trust Authority, if it does its job, will serve as a watchdog to ensure that neither DNR nor the legislature mismanages these trust lands again. . . . [I]t is clear that the sometimes powerless have been empowered. The Trust Authority can be a powerful advocate for the real needs of those who have so much difficulty advocating for themselves.

b. Budgeting advantages

The superior court found that the budgeting procedures in HB 201, set forth at AS 47.30.046 and AS 37.14.003-.005,

> may prove to be significant as the budget for the integrated comprehensive mental health program competes with other needs for general fund appropriations. The mental health budget is given an advantage for inclusion in the governor's budget over the budgets of other state agencies. The mental health budget is given an advantage before the legislature both from its separation from other appropriations and in the required legislative report. Clearly, there are no guarantees of adequate funding or expanded funding for necessary services, but these budget advantages may prove to be significant nonetheless.

Weiss argues that the superior court erred in not quantifying the benefit of these "budgeting advantages." It would make little sense, however, to require the trial court to quantify the value of such terms; as the court recognized, their significance remains to be seen. However, like the Trust Authority, the budgeting advantages would almost certainly not be established through continued litigation. Therefore, the superior court did not err in considering these procedures a benefit, albeit of unknown value, to the class.

c. Land management

Weiss makes several interrelated arguments with regard to the land management provisions of the settlement agreement. First, he contends that the management regime is "illegal"

because it allegedly does not require trust lands to be managed "solely in the best interest of the beneficiaries." Weiss also asserts that the court erred by considering the "not very concrete" benefit of management of trust land by a special DNR unit.[24]

Weiss argues that the settlement's management scheme is illegal because it provides that DNR "shall manage mental health trust land under those provisions of law applicable to other state land." AS 38.05.801(b)(1). This argument is unconvincing. HB 201 explicitly makes this provision subject to the overall requirement that the lands "be managed consistent with the trust principles imposed" by the AMHEA. AS 38.05.801(a). In light of this express language, the trial court reasonably concluded that the settlement's management standard conforms with the requirements of the trust.

Weiss also argues that the management provisions are illegal because they require that DNR's regulations "address . . . management for multiple use of trust land." We agree with the superior court, however, that when "viewed in its entirety, there is actually no conflict" in the statute between the multiple-use subsection and the subsections requiring maintenance of the trust land base and management for the benefit of the trust and long-term sustained yield of products from the land. As the superior court noted, multiple use can refer to multiple types of development as well as to combining recreation or preservation with development.[25] Moreover, recognition of the "unique

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[24] Weiss also argues briefly that the superior court erred by not reducing the value of settlement land because of the settlement's management regime. This argument assumes that the State's management under the settlement will be different than the management resulting from continued litigation. As discussed below, the court did not err in refusing to accept this assumption.

[25] The law review article from which the management provisions adopted by HB 201 are derived reinforces the superior court's interpretation of the term "multiple use" in the context of state trust lands: "Management for multiple

scenic, paleontological, and archeological values" of trust lands is not necessarily incompatible with trust principles, even under the stringent rules governing school trust lands. National Parks & Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 921 (Utah 1993).

Weiss also takes issue with the superior court's appraisal of the value of the settlement's creation of a separate unit within DNR to manage trust lands. The superior court found

> the addition of a special unit to manage these lands to be an improvement over general management by DNR for several reasons. First, the land managers in the special unit will have a smaller amount of land per person to manage than those in DNR. This should allow managers to be proactive managers instead of passive managers. Second, the special unit members can be trained in the special rules applicable to trust management and will have to apply only those rules and those laws applicable to other state lands which do not conflict with trust management under the Enabling Act. Third, the individuals in the special unit may develop a sense of pride in their special charge.

Even if, as Weiss asserts, the trial court's first point is not supported by evidence, the court's second and third points offer ample support for its conclusion that management by a

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uses on state trust lands varies from the common conception of multiple use as it is applied to federal lands. In the states' case, multiple uses must either contribute to the overall generation of revenues for the trust, must be revenue neutral, or must be funded by other sources." Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 798, 905 (1992).

specialized unit will probably be an improvement over the result of continued litigation.

In summary, the program benefits at best offer a considerable advantage over continued litigation. At worst, they are as favorable as the likely product of continued litigation. Therefore, we hold that the superior court did not err in its appraisal of the settlement's provisions regarding the Trust Authority, the budgeting procedures, and land management.[26]

6. Enforceability

Weiss argues that the superior court erred in approving a settlement that "is not legally enforceable." The settlement agreement provides:

> By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, and acknowledge that the trust is reconstituted in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985). The provisions of . . . HB 201 . . . constitute material terms upon which the plaintiffs have agreed to a dismissal and acknowledged that the trust is reconstituted. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such

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[26] The superior court also noted that approval of the settlement eliminated the risk that the so-called "non-settlement provisions" of HB 201 would be upheld as "curative legislation" for the State's breach of the trust. If the superior court had not approved the settlement, the non-settlement provisions of HB 201 would have "reconstituted" the trust with the settlement lands but without the $200 million in cash, establishment of the Trust Authority, or enactment of the budgeting procedures.

> relief as may be appropriate in light of the plaintiffs' claims. In light of the dismissal of each parties' [sic] claims, no modification of this agreement may be made except in writing signed by all the parties. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

The superior court noted in its decision granting final approval that "nothing in HB 201, the Settlement Agreement, or this decision can prevent a future legislature from passing legislation affecting the trust, but there are remedy provisions if this happens and deterrents exist." The court stated that, in the event of such legislative action, the class can move for relief from judgment under Civil Rule 60(b)(6). The trial court also relied on the expectation that the Trust Authority, as an advocate for the trust, will

> actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority may also be in a position to influence the governor to veto any legislation which makes a material change in this settlement.

Finally, the trial court found that third parties, such as "purchasers of state land, hardrock miners, and oil companies . . . would undoubtedly lobby the legislature to maintain stability in land titles in order to avoid disrupting land development in Alaska with another lawsuit."

Weiss contends that Rule 60(b) "is not an appropriate enforcement vehicle," citing O'Link v. O'Link, 632 P.2d 225, 229 (Alaska 1981), for the proposition that relief under the rule is available only under "the most extraordinary of circumstances." In O'Link, we stated: "Clause (6) [of Rule 60(b)] and the first

five clauses of Rule 60(b) . . . are mutually exclusive. Relief under clause (6) is not available unless the other clauses are inapplicable. . . . Clause (6) is reserved for extraordinary circumstances not covered by the preceding clauses." 632 P.2d at 229. This rule, however, does not contradict the well-established practice of using Rule 60(b)(6) "to return the parties to the status quo" after "one party fails to comply" with a settlement agreement. 11 Charles A. Wright et al., Federal Practice and Procedure § 2864, at 352 (1995).[27] A material change of the settlement agreement by the legislature would thus present one of the narrowly defined situations that clearly present "other reason[s] justifying relief" under Rule 60(b)(6).

Weiss also argues that the court should not have approved the settlement unless the State agreed "to be bound by a consent decree or otherwise subject to specific performance." The Proponents respond that plaintiffs "retain the ability to specifically enforce the settlement agreement" and "to enforce legislation enacted as part of the settlement." They argue that no agreement could bind future legislatures so as to prevent amendment of the HB 201 settlement statutes. The Proponents are correct. It is a well-established principle that one legislature cannot abridge the power of a succeeding legislature. 73 Am. Jur. 2d Statutes § 34 (1974); State v. Lewis, 559 P.2d 630, 643 (Alaska 1977); Application of Hendrick & Irish, 922 P.2d 943, 951 (Haw. 1996). Thus, it would be impossible for the State to grant the enforcement terms Weiss would require. Furthermore, the proponents are also correct in stating that the court relied primarily on the "product" elements of the settlement, that is, the reconstitution of the trust with land and cash, rather than on the "process" elements contained in the program benefits. The class

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[27] Because Rule 60(b)(6) is modeled on its federal counterpart, federal authorities are instructive in interpreting the state rule. See Agostinho v. Fairbanks Clinic, 821 P.2d 714, 716 n.4 (Alaska 1991).

need not rely entirely on either judicial supervision or "the good faith cooperation of the defendants," Morales v. Turman, 569 F. Supp. 332, 334 (E.D. Tex. 1983), to ensure the realization of significant benefits of the settlement. Therefore, the superior court did not err in granting approval to the settlement.

7. Summary

In summary, the superior court did not err in its careful evaluation of the settlement and the likely result of continued litigation. After taking into account "the uncertainties of law and fact . . . and the concomitant risks and costs necessarily inherent in taking [the] litigation to completion," the court did not abuse its discretion in holding that the settlement is fair, adequate, and reasonable.

C. Did the Superior Court Abuse Its Discretion by Establishing the Approval Process?

Weiss also attacks the process under which the settlement was negotiated and approved. Specifically, he objects to (1) the superior court's definition of the class, (2) the conduct of negotiations between the parties, (3) the notice to class members and the court's consideration of class comments, and (4) the schedule established by the court for consideration of the settlement.[28]

1. Definition of the class

The superior court redefined the class in 1994 as

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[28] Weiss also argues that the trial court abused its discretion by not granting preliminary approval to the Chapter 66 settlement and by denying a motion to substitute Billy R. Cross for John Martin. Because our decision moots these issues, we do not address them.

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer major mental illness, and such other persons needing mental health services as the legislature may determine.

The trial court ordered this redefinition on the motion of Weiss and AMHA to make the class "co-extensive with the beneficiaries of the trust" as determined by the superior court's Beneficiary Decision in 1988. Weiss argues that the superior court's Beneficiary Decision erroneously included the developmentally disabled[29] as beneficiaries of the trust and hence members of the class.

The superior court based its Beneficiary Decision on a review of the legislative history of the AMHEA. The court concluded, and Weiss does not dispute, that the version of the bill originally passed by the House included the developmentally disabled as beneficiaries of the trust. Weiss asserts, however, that the Senate "disagreed that they should be included." As evidence for this position, he relies on a comment made by the sponsor of the bill in the Senate, Senator Jackson, that "[t]here are a lot of people who are mentally retarded that should not be under the provision of this bill." The context of this remark, however, suggests that Senator Jackson was concerned that inclusion of the developmentally disabled under the AMHEA's definition of "mentally ill" might lead to their imprisonment or stigmatization, not that he felt they should be excluded as

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[29] See supra note 4.

beneficiaries. Furthermore, Senator Jackson never came to a conclusion on the matter; after a brief exchange, he merely states, "I do not know. My mind is open . . . ." His statement thus provides no evidence of legislative intent to exclude the developmentally disabled as beneficiaries of the trust.

Weiss also argues that the Senate's refusal to adopt language suggested by the Department of Health, Education, and Welfare (HEW) demonstrates its intent not to include the developmentally disabled. The proposed language would have replaced the phrase "mentally ill" in the House version of AMHEA § 202(e) with the phrase "the mental health program of Alaska, including (but not by way of limitation) the out-patient and in-patient care and treatment of the mentally ill, and of the mentally defective and mentally retarded, of Alaska." The version of the AMHEA finally passed by the Senate retained the phrase "mental health program," but dropped the remainder of HEW's proposed language. The report by the House managers noted the difference between the House version, defining the phrase "mentally ill" to include the developmentally disabled, and the Senate version, using the phrase "mental health program" with no definition. The managers stated that they "accepted this Senate amendment which broadens the use of the revenues for use of the Alaska mental-health program rather than for the hospitalization and care of the mentally ill in Alaska." Because the House version included the developmentally disabled, the superior court reasonably concluded that a version that "broadens" the program would also include those individuals. Moreover, the relatively vague phrase "mental health program" does not support an intent by the Senate to exclude potential beneficiary groups. The Senate's decision not to adopt the rest of HEW's proposed amendment shows little more than a desire to avoid cumbersome and unnecessary language.

The superior court's conclusion is also supported by other parts of the AMHEA. Along with the land grant, the AMHEA provided for grants

> to the Territory of Alaska to assist it to carry out plans, submitted by the Governor of the Territory or his designee and approved by the Surgeon General, for an integrated mental health program for the Territory, including outpatient and inpatient care and treatment.

AMHEA § 201. This suggests that Congress intended the meaning of the term "mental health program" to be determined by the Territory and the Surgeon General. The superior court found, and Weiss does not dispute, that the first mental health program enacted by the Territory in 1957 defined "mentally ill individual" as "an individual having a psychiatric or other disease or senile changes which substantially impair his mental health or who is mentally deficient." The superior court also noted that one impetus for passage of the AMHEA was to end the need for placing Alaskans with mental problems in Morningside Hospital in Portland. These Alaskans included the developmentally disabled. Therefore, we hold that the superior court did not err in determining that Congress intended the developmentally disabled to be beneficiaries of the trust and hence members of the plaintiff class in this litigation.

2. Settlement negotiations

Weiss argues that the HB 201 settlement was the result of collusion between the State and counsel for the H.L. and Bosel Intervenors.[30] Weiss claims that collusion occurred between the

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[30] Weiss also argues that the superior court erred by failing to make a specific finding that the class was adequately represented. The case upon which Weiss relies, In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 & n.21 (7th Cir. 1979), supports the proposition that the court must consider whether the class is adequately represented by the "representative parties" in the action under Alaska Civil Rule 23(a)(4). However, neither that case nor any other authority requires the trial court to make a specific finding

State and Proponents because Proponents (1) "caused the State to withdraw from the Chapter 66 Settlement Agreement by being willing to support" the HB 201 settlement, (2) supported the "passage of legislation [HB 201] that provided for the dismantling of the trust if their negotiated settlement is not approved by the courts," (3) "negotiated a settlement and a schedule that would not allow judicial determination of whether the [Trust Authority's] key right to spend the Trust's income free of legislative appropriation was constitutional," and (4) "assured the mental health community that they would only accept a settlement that contained certain elements to gain their support and then negotiated a settlement that did not contain those elements." The superior court considered these arguments in its decision granting preliminary approval and found no evidence of collusion. Instead, it found that Weiss's points merely demonstrated "that the attorneys had legitimate disagreements."

A trial court "may not approve a proposed settlement if it is the product of fraud or overreaching by, or collusion among, the negotiating parties." In re Pacific Enters. Secs. Litig., 47 F.3d 373, 378 (9th Cir. 1995) (quotation omitted). Black's Law Dictionary defines "collusion" as follows: "An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose." Black's Law Dictionary 264 (6th ed. 1990). In the absence of evidence to the contrary, "courts generally attach 'a presumption of correctness . . . to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery.'"

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that the class is adequately represented by counsel. Even if there were such a requirement, the superior court's consideration of the conduct of the settlement negotiations by Proponents' counsel would have met it.

Herbert B. Newberg & Alba Conte, 2 Newberg on Class Actions § 11.28, at 11-59 (1992) (quoting Manual for Complex Litigation, Second § 30.44 (1985)). Evidence suggesting collusion may include significant differences in the relief received by different groups within the class or the simultaneous negotiation of attorney's fees and class claims. See Manual for Complex Litigation, Third § 30.42 (1995).

Given these principles, we conclude that even if Weiss's first three allegations are true, they do not establish collusion. As Proponents point out, Weiss does not allege that secret meetings were held, that Proponents' counsel excluded his counsel from meetings, that settlement proposals were not relayed as they were received, that he was not allowed to comment on the proposals, or that he was not free to negotiate independently with the State. Furthermore, there is no argument that Proponents or Proponents' counsel benefitted from the settlement unfairly. The superior court properly found that these arguments show merely "that the attorneys had legitimate disagreements."

Weiss's principal evidence supporting the fourth allegation is a letter written by counsel for AMHA purportedly documenting an agreement as to negotiating strategy between counsel. The superior court specifically found that "the attorneys had legitimate disagreements over the interpretation" of that letter. While Weiss argues that the letter embodied a "formal agreement" representing "absolute bottom line requirements for a settlement," Proponents interpret the letter "as evidence of Weiss's counsel's continued support for the basic settlement proposal." Considering the ambiguous language of the letter, the fact that counsel for Proponents never responded to it, and the continued willingness of counsel for Weiss to participate in a settlement even after the alleged agreement had been "breached," the superior court did not err in finding that the letter showed no evidence of collusion on the part of counsel for the H.L and Bosel Intervenors.

3. Notice

Notice of the proposed settlement was sent to every household in Alaska and to 1400 providers of mental health and other services. In addition, notice was published in newspapers, announced on radio and television, distributed on audio cassette, published in Braille and large print, and translated into Spanish, Filipino, Inupiaq, and Yupik. The notice allowed for comments by members of the public, including family, guardians and friends of beneficiaries, and provided a form allowing commentors to identify themselves as beneficiary members of the class, guardians or relatives of a class member, or members of the public. The trial court received 1088 comments, about 150 from class members, eighty from advocacy groups or people "indicating they work in the mental health field," and about 170 from family members and guardians of class members. The court treated comments from these groups as class comments, but considered all others public comments and gave them little weight. Weiss argues that the superior court abused its discretion in approving the content of the notice and by allowing individuals who were not members of the class to comment.

Weiss objects to the content of the notices, asserting that it: (1) was "silent on the State's unilateral right to alter the settlement;" (2) failed to inform the class of the risk that the power of the Trust Authority to spend trust funds without legislative appropriation might be found unconstitutional; (3) did not mention that more litigation might be required to ensure that land management regulations comply with the AMHEA; (4) did not urge the class to "consider the importance of cash to them;" (5) did not "describe the value of the original Trust and the value of the HB 201 Settlement Trust; (6) stated that the settlement contained 930,000 acres as compared with 1,000,000 acres "without any kind of disclosure that only land that no one else wanted is included;" (7) incorrectly suggested that the "settlement commits the State and Trust Authority to providing an adequate mental health program;" and (8) falsely stated that the Trust Authority would "oversee" management of trust land.

According to one authority,[31]

> [t]he contents of a Rule 23(e) notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing.
>
> The notice should be brief and reasonably clear to the minimally sophisticated layperson. However, the terms of the settlement and the course of the litigation should not be oversimplified to increase readability at the expense of accuracy and completeness. Of course, as the length of litigation, the complexity of issues, and the variety of terms of settlement increase, their description in a Rule 23(e) notice will generally be more elaborate. . . . [W]here some multiple plaintiffs oppose a proposed class settlement, the court in its discretion may insist that notice of the settlement under those circumstances be neutral in tone and should not include either a party's or the court's arguments for or against settlement.

2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 8.32 (3d ed. 1992) (footnotes omitted).

The notice provided by the superior court meets these criteria. Moreover, adopting Weiss's suggestions would have created a substantial risk of either misleading class members or violating the neutral tone called for by the class's split over the

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[31] See supra note 27.

settlement. The trial court successfully struck a difficult balance between providing enough information for the class to evaluate the settlement and making the notice understandable to as many class members as possible. Therefore we conclude that the superior court did not abuse its discretion by approving the content of the notice.

In arguing that the superior court abused its discretion by allowing comments by individuals who are not class members, Weiss relies on Gould v. Alleco, Inc., 883 F.2d 281 (4th Cir. 1989). This case stands for the unobjectionable proposition that only class members have standing to object to settlement proposals. Id. at 284. The Gould court, however, explicitly stated that its "ruling regarding the lack of standing of non-class members to object to proposed settlements should not be read to restrict the trial court's authority to consider or even solicit the views of non-parties to proposed class settlements." Id. at 284 n.3.

Accepting comments from individuals outside of the class was particularly appropriate in this case because, as the superior court stated, "many members of the class may not be able to understand the notice or speak for themselves." Thus, the court properly considered the "comments from family members, guardians, advocacy groups, mental health professionals, and others working directly with trust beneficiaries" as class comments. Furthermore, the court, by including a space on the notice form for commentors to identify their status with respect to the litigation, provided adequate protection against the risk of improperly considering comments from the general public. Judge Greene adopted an excellent procedure both for disseminating notice of the proposed settlement and for distinguishing class comments from public comments so as to evaluate each appropriately.

4. Due process

Finally, Weiss argues that he was denied due process because the superior court did not grant "adequate time to brief, prepare for and conduct the hearings" and "did not give the time to its deliberations necessary to fulfill [his] right to a fair and impartial decision." We have stated that due process under the state constitution requires "notice and opportunity for hearing appropriate to the nature of the case." Carvalho v. Carvalho, 838 P.2d 259, 262 (Alaska 1992) (citations omitted). The United States Supreme Court has further stated that due process under the Federal Constitution requires that every person "shall have the protection of [a] day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial." Truax v. Corrigan, 257 U.S. 312, 332 (1921).

Weiss cites a number of cases in support of his position that the superior court failed to give him adequate time to satisfy his due process rights to contest the HB 201 settlement. In these cases, however, the injured party was denied all opportunity for a hearing, not merely constrained by the court's schedule.[32] E.g. Carvalho v. Carvalho, 838 P.2d 259, 263 (Alaska 1992); Frontier Saloon, Inc., v. Alcoholic Beverage Control Bd., 524 P.2d 657, 658 (Alaska 1974). In this case, the trial court

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[32] Weiss also cites Channel Flying, Inc. v. Bernhardt, 451 P.2d 570, 572-73 (Alaska 1969), to support the statement that we have "recognized the due process implications of forcing a litigant to proceed without having an adequate opportunity to prepare." In Bernhardt, we stated that a trial judge erred by not allowing a party reasonable time to respond to late filings raising matters "which petitioners would find it important to meet if they were to succeed in their efforts to obtain a preliminary injunction." Id. at 573. Weiss makes no allegation that the parties did not have equal amounts of time to prepare and present their cases and to respond to the arguments of their opponents.

established a seven-month schedule to consider the settlement and conducted a four-day evidentiary hearing on preliminary approval and a ten-day evidentiary hearing on final approval. Weiss introduced considerable testimony in support of his position, including testimony of twelve expert witnesses at the final approval hearing, and exhaustively briefed his opposition to both preliminary and final approval as well as a number of other related issues. Weiss clearly had ample opportunity to present his case.

Furthermore, Weiss fails to identify how any time constraints caused him serious prejudice. We will not disturb a trial court's refusal to grant a continuance unless a party has been seriously prejudiced by that refusal. House v. House, 779 P.2d 1204, 1206 (Alaska 1989). In this case, as in House, the lower court's ruling was "based on a review of all the relevant evidence and . . . the complaining party had reasonable opportunity in court to introduce evidence and contest the other side's evidence. Inability to mount a successful case does not mean that due process was violated or that an abuse of discretion occurred." Id. at 1207. Therefore we hold that the superior court did not violate Weiss's due process rights by establishing and adhering to its schedule for final approval.

We also reject Weiss's assertion that the superior court failed to give adequate consideration to his claims. Judge Greene's thorough, deliberative, and well-reasoned analysis is documented by her fifty-eight page preliminary approval memorandum, her 137-page final approval memorandum, and her other decisions resolving earlier stages of this litigation. We are satisfied that Judge Greene gave Weiss's position the full benefit of her able consideration.

IV. CONCLUSION

In closing, we echo Judge Greene's thoughts on the resolution of this lengthy litigation:

> The settlement process as a whole has done some harm. The class and their families are very divided on the question of this settlement. Some may feel cheated and abandoned by this decision approving it. Others may feel vindicated. Hopefully, neither will persist in those feelings. Whether or not to approve this settlement was a very difficult and complex decision. The court shares many of the concerns that have been expressed by the class. The task that lies ahead for the beneficiaries, their friends and families is to come together to make the best of this agreement. The beneficiaries will need to speak with one voice again, if their concerns are not heeded. They need to heal the divisions that exist today and vow as recommended by one commenting beneficiary to go "out of the courts and into the budget."

We conclude that Judge Greene's approval of the HB 201 settlement demonstrated a sound understanding of the relevant authority and the facts of this case, as well as a keen regard for the rights and interests of the plaintiff class. Weiss has not clearly demonstrated that approval of the settlement on the basis that it was fair, adequate, and reasonable constitutes an abuse of discretion. Therefore, we AFFIRM the superior court's decision.

SUPREME COURT OF ALASKA

STATE OF ALASKA,)
Appellant/Cross-Appellee,)
vs.)
VERN T. WEISS, et al.,)
Appellee/Cross-Appellant.)
)

Nos. S-653/678, No. 2987
706 P.2d 681
October 4, 1985

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Warren W. Taylor, Judge.

COUNSEL

G. Thomas Koester, Assistant Attorney General, Norman C. Gorsuch, Attorney General, Juneau, for Appellant/Cross-Appellee.

Stephen C. Cowper, Fairbanks, for Appellee/Cross-Appellant. Russ Winner, McGrath & Associates, Anchorage, for Amicus Curiae Cook Inlet Region, Inc.

JUDGES

Before: Rabinowitz, Chief Justice, Burke, Matthews and Compton, Justices. Moore, Justice, not participating

OPINION

COMPTON, Justice. OPINION

The State of Alaska ("state") appeals from a judgment of the superior court holding that the state breached its duty as trustee of federal mental health grant lands when the legislature redesignated the property as "general grant land." For the reasons

set forth below, we affirm the holding to this extent, but reverse the superior court's conclusion that the redesignation legislation was valid.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1956 the United States Congress passed the Alaska Mental Health Enabling Act (AMHEA) which, insofar as it concerns this case, granted the Territory of Alaska one million acres of federal land to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska. Pub. L. No. 84-830, 70 Stat. 709 (1956). Section 202(e) of the Act specifically provides:

> *All lands granted* to the Territory of Alaska under this section, together with the income therefrom and the *proceeds* from any dispositions thereof, *shall be administered by the Territory of Alaska as a public trust* and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

The state managed these lands without maintaining a separate account until 1978. The Alaska State Legislature made its practice law in 1978 when it passed the following statutory provision:

> REDESIGNATION AND DISPOSAL OF MENTAL HEALTH LAND
>
> (a) Land granted to the state under the Mental Health Enabling Act of 1956, 70 Stat. 709, and patented to or approved for patent to the state on July 1, 1978 and land designated as mental health land which was received by the state in exchange for land granted under that federal land grant is redesignated as general grant land and shall be managed and disposed of by the Department of Natural Resources under applicable provisions of law.

Ch. 181, § 3(a), SLA (1978).

Alaska has provided continuous mental health care since statehood. The record indicates that between 1959 and 1982 the state spent over $222,000,000 on mental health care. Generally speaking, there has been a constant increase from 1959 to the present in mental health expenditures: slightly less than $1,200,000 was expended in 1959, and slightly more than $29,000,000 was expended in 1982. The record does not indicate how much of the trust land at issue has been disposed of, nor the total value of such disposed land. In the state's answer to the complaint, it alleges that "state expenditures for mental health purposes exceeded revenues from mental health grant lands in all years for which revenues from those lands were tabulated separately." The record does indicate that as of 1973, total revenues from these mental health trust lands amounted to $19,555,582. The state's total expenditures to that point amounted to $66,726,176.

Weiss et al. filed a class action in 1982 alleging that the state breached the public trust by 1) failing to account for revenues realized, 2) using revenues for purposes other than mental health care and 3) passing legislation redesignating the property "general grant land." Plaintiffs sought declaratory relief invalidating the redesignation legislation; injunctive relief compelling the state to administer the trust according to the law; general relief establishing a trust account "for the receipt of funds generated from all lands selected by the State of Alaska under the aforesaid mental health land grant . . . ."

The superior court ruled that invalidation of the redesignation legislation was not an available remedy, based on *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981). However, the court did hold that the state breached its duties as trustee by removing the federal grant lands from the trust. As a remedy, the court ordered that

> [t]he public trust established by P.L. 84-830, 70 Stat. 709, shall recover from the defendant State of Alaska an amount equal to the fair market value of all lands conveyed from the trust as of the date of conveyance, plus prejudgment interest from the date of each conveyance. For the purposes of this judgment, all lands remaining in the trust as of July 19, 1978, shall be considered as having been removed from trust status by the State of Alaska on that date . . . .

The court also ordered a set-off for all monies spent by the state on mental health care.

The state appeals from the judgment, except the holding that the redesignation legislation was valid. Weiss *et al.* cross-appealed the trial court's failure to rule the legislation invalid.

II. DID THE STATE BREACH THE PUBLIC TRUST CREATED BY CONGRESS WHEN IT REDESIGNATED

PROPERTY IN THE TRUST AS "GENERAL GRANT LAND?"

A. Nature of the Trust.

The state argues, essentially, that the redesignation is of no legal consequence because the state has always provided public mental health programs in the past and, implicitly, will provide them in the future. The state maintains that providing such programs fulfills its obligations according to AMHEA, freeing the grant lands for other public purposes. Textual support for this position comes from the portion of Section 202(e) which states that "proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska." It is suggested that this language means Congress intended that the land grant serve as a revenue base guarantee. Great emphasis is placed on the legislative history of AMHEA which establishes that Congress did not wish to limit the use of grant lands *exclusively* to mental health programs.[1]

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[1] The debates in the House and Senate are too lengthy to reproduce in their entirety here, but certain remarks are representative of the discussions. Senator Jackson commented that "the income from sales or leases will be used to support the mental health program in Alaska. The income will be held in trust for that purpose. Any money received over and above the need for the mental health program may be used for other public purposes." He further noted that the language change was not of a fundamental nature, and thus said that, "the purpose of granting 1 million acres is the same as in all other similar grants, such as the public school land-grant program." 102 Cong. Rec. 9761 (June 7, 1956).
We note that the language in the federal grant was changed from designating the proceeds of the land grant to be used as a public trust for Alaska's mental health program, to saying that the proceeds "shall first be applied to meet the necessary expenses of the mental health program" only because of worry among members of Congress that the land may actually have a value far in excess of the necessary health care expenses. The record in this case shows that income from the land grant was actually less than state expenditures for mental health programs.

Despite these observations, we think it irrefutable that Congress intended to create a trust, to be based on a corpus of one million acres of federal land. It is a commonplace of the law that without trust property there can be no trust. Restatement (Second) of Trusts § 74 (1959).[2] When the state, through the legislature, altered the status of the property grant the trust was thereby effectively terminated. The state, as trustee, had no power to do this and consequently breached its duty to preserve the corpus.[3] The fact that the state has provided mental health care in the past and will most likely do so in the future is no justification for termination of the trust. Whether a beneficiary can rely on the *bona fides* of a trustee to continue voluntarily to uphold the terms of a defunct trust is quite beside the point. We decline the opportunity to encourage the state, or any trustee for that matter, to determine unilaterally when to terminate a trust without specific authority to do so.

B. Remedy.

Having concluded that the state breached the trust, we find it necessary on the facts of this case to invalidate the redesignation statute, Ch. 181, § 3(a), SLA (1978). *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981) does not compel a different result. In that case, the federal government had granted 100,000 acres to the state "for the exclusive use and benefit" of the University. Id. at 811. Years after the grant, the state included 5,040 acres of the trust land in a state park. This

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[2] Section 74 provides: "A trust cannot be created unless there is trust property."

[3] Our reliance upon basic trust law principles finds ample support in the precedents of this court and the United States Supreme Court. See *Lassen v. Arizona*, 385 U.S. 458, 17 L. Ed. 2d 515, 87 S. Ct. 584 (1967); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981). Both *Lassen* and *University of Alaska* involved federal grants to be used by states for school purposes. Those cases stand for the proposition "that the same private trust law principles are to apply to federal land granted to the states for school purposes." *University of Alaska*, 624 P.2d at 813. There is no reason to treat federal lands granted for mental health purposes differently.

action was not in itself a breach of the trust so long as the University was paid fair market value for the land. We inferred that the legislature intended to pay the University for this disposition, stating:

> It is also logical to assume that the legislature intended to compensate the University for the loss of its land. This view gives the statute creating [the park] a reading that is in accord with the well recognized cannon of statutory construction that, when possible, legislation should be construed in a way that upholds its validity.

524 P.2d at 816.

Unlike the situation in *University of Alaska*, the present case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the trust is intermingled with the general grant lands of the state. No particular use of the trust lands is specified and it may be years before much of the land is used. While it was reasonable to infer a legislative intent to pay for 5,040 acres for which there was a present park land use in *University of Alaska*, it is not reasonable to infer that the legislature meant to pay for a quantity of trust land approaching one million acres for which in large part there is no present use. Thus, the payment remedy imposed in *University of Alaska* is not appropriate here. Because the state in passing the redesignation act went beyond the power which had been granted it with respect to the trust lands by Congress, the redesignation act must be declared invalid.

It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.

Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.[4]

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings consistent with this opinion.

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[4] Amicus raises questions regarding the title held by conveyances and bona fide purchasers of mental health lands. In view of our disposition of this case, we deem it unnecessary to address those issues at the present time.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,	)	FILED in the Trial Courts State of Alaska Fourth District Dec 06, 1994
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

Case No. 4FA-82-2208 Civil

MEMORANDUM DECISION AND ORDER GRANTING FINAL APPROVAL TO THE HB 201 SETTLEMENT

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I. INTRODUCTION

This lawsuit is a class action which began twelve years ago. Alaska Civil Procedure Rule 23 contains procedures specifically governing class actions in state courts. It is essentially identical to the corresponding federal rule. See Alaska R. Civ. P. 23. Subsection (e) of Rule 23 safeguards the rights of class members by requiring court approval of any proposed settlement after notice has been given to the class.[1] Alaska R. Civ. P. 23(e). Due process requires that notice to the class members be given

[1]Alaska Civil Rule 23(e) states:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Alaska R. Civ. P. 23(e).

because settlement of a class action has res judicata effects on all class members.[2] Grunin v. Intern'l House of Pancakes, 513 F.2d 114, 120 (8th Cir.), cert. denied, 423 U.S. 864, 46 L.Ed.2d 93 (1975). The requirement of court approval of settlements prevents private agreements which are contrary to the best interests of the class and protects the interests of absent class members who are not among the negotiating parties.[3] In re Agent Orange Product Liability Litigation, 597 F.Supp. 740, 758 (E.D.N.Y. 1984).

The approval process for settlement of a class action involves several steps: (1) submission of the proposed settlement to the court; (2) if necessary, an evidentiary hearing about the negotiation process and other concerns about the settlement proposal; (3) preliminary approval by the court and an order regarding notice to the class and the scheduling of a final hearing at which members of the class may comment; (4) notice informing class members of the proposed settlement and solicitation of their comments concerning the settlement; (5) a fairness or final approval hearing regarding whether the settlement is reasonable and fair to the class; (6) final approval of the settlement by the court and either dismissal of the case or continuing court oversight of the implementation of settlement provisions. See generally H. Newberg, Newberg on Class Actions § 11 (3d ed. 1992); Manual for Complex Litigation, Second § 30.4 (1985) ["MCL2d"].

At the preliminary approval stage, the court determines whether the proposed settlement has obvious deficiencies and is

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[2]The type of notice required for due process depends upon the nature of the class and the kind of relief involved. This is discussed in relation to this case in part IV of this Memorandum Decision.

[3]The Civil Rule 23(e) requirements for the settlement of class actions are necessary because of the possibility that:

> substantial rights of the class may be bargained away in exchange for relief which inures primarily to the named plaintiffs or to class counsel. Because of the potential for abuse, protection of class interests cannot be left to class counsel alone. The Court must act as the guardian of the class.

Holden v. Burlington Northern Inc., 665 F. Supp. 1398, 1406 (D. Minn. 1987) (citations omitted).

sufficiently within the range of possible approval to warrant the time and expense for giving notice to the class. See, e.g., Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980). At the final hearing, proponents of the settlement must convince the court that the proposed settlement is "fair, reasonable, and adequate" before final approval may be granted. E.g., Grunin v. International House of Pancakes, 513 F.2d at 123. The class comment portion of the final approval hearing provides an opportunity for class members to present their objections to the settlement. In re Agent Orange, 597 F. Supp. at 759.

The court's role in reviewing a class settlement is limited to the minimum necessary to protect the interests of the class. Armstrong, 616 F.2d at 315. A class action settlement remains a bargained bilateral compromise negotiated between the litigants. Id. The court has no authority to delete, modify, or substitute terms of the settlement and can only accept or reject the settlement proposal as it is presented. Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 630 (9th Cir. 1982); MCL 2d § 30.41, at 237.

This proposed settlement is now before the court for decision on whether it should receive final approval. It was submitted by three of the parties in June 1994. The court conducted an evidentiary hearing in July. The court granted preliminary approval on July 29, 1994. The class has received notice. The court has received comments from the class. The court conducted a lengthy hearing on the fairness of the settlement. The opinion that follows explains the process and contains an analysis of the settlement agreement.

II. BACKGROUND

A. History of the Case

The mental health lands trust was created by Congress with passage of the Alaska Mental Health Enabling Act of 1956 ["Enabling Act"]. Pub. L. No. 84-830, 70 Stat. 709 (1956). The Enabling Act transferred responsibility for mental health programs

from the federal government to the Territory of Alaska and granted a one million acre trust to the Territory to aid in the financial support of a comprehensive mental health program.[4] Pub. L. No. 84-830, §§ 101, 202, 70 Stat. 709 (1956). Section 202(e) of the Enabling Act states:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

Pub. L. No. 84-830, § 202(e), 70 Stat. 709 (1956). Section 6(k) of the Alaska Statehood Act confirmed and transferred the mental health trust land grant from the Territory to the State. Pub. L. No. 85-508, § 6(k), 72 Stat. 339 (1958).

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[4]In 1956 no mental health services existed in Alaska. The federal government transported mentally ill and mentally retarded people in need of hospitalization to the Morningside Hospital in Portland, Oregon.

The State of Alaska managed trust lands in the same manner as lands granted under section 6(a)-(b) of the Alaska Statehood Act ["general grant lands"] and did not maintain separate accounting for revenue produced by trust lands.[5] Because the mental health trust lands were some of the first land parcels selected by Alaska, trust lands were among the most attractive state lands for surface value use both for private development and public purposes. During the 1970's there was growing pressure on the Legislature to convey state-owned land to private individuals and municipalities. In 1978, the Alaska Legislature enacted Chapters 182 and 181, SLA 1978, redesignating mental health trust lands as general grant lands to be managed and conveyed as all other state-owned lands. A percentage of all State land revenue was to be paid to a mental health trust fund to compensate the trust for the loss of the lands "subject to legislative appropriation of sufficient funds." Ch. 182 § 4, SLA 1978. No money was ever appropriated by the legislature to the fund.

After the redesignation legislation, some of the original mental health trust land was set aside for public purposes such as parks, recreation, and wildlife habitat. Much of the trust land located within municipal boundaries was transferred to municipalities, who later sold some of this land to private individuals. Many of the trust lands most suitable for development were sold by the State to private individuals through the land sale programs implemented by the Alaska Department of Natural Resources ["DNR"]. Overall, up to 50,000 acres were conveyed to private individuals, over 40,000 acres were conveyed to municipalities, and over 350,000 acres were placed in legislatively designated areas[6] such as

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[5]Most state-owned lands are the general grant lands conveyed to Alaska under subsections (a) and (b) of section 6 in the Alaska Statehood Act.

[6]In legislation for a previous settlement attempt in this case, the term "legislatively designated area" was defined as land designated by state law as a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range. Ch. 66 §§ 54(6), 55(b), SLA 1991.

state forests, parks and wildlife areas. Only about 35 percent of the original one million acres of trust land remained unencumbered and in state ownership in 1985.

Vern Weiss, on behalf of his son Carl Weiss, and Earl Hilliker filed this lawsuit as a proposed class action on November 26, 1982. The complaint stated that Earl Hilliker and Carl Weiss were in need of mental health services unavailable in Alaska. They claimed that the State breached the mental health lands trust by failing to account for trust revenues, using the revenue from trust lands for purposes other than mental health services, and redesignating trust lands as general grant lands. In January 1983, the lawsuit was certified as a class action, and the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska." Order Certifying Action (Jan. 26, 1983) (Judge Taylor). The superior court ruled that the State breached its duties as trustee by redesignating the trust lands as general grant lands, but also ruled that invalidation of the 1978 redesignation legislation was not an available remedy. The superior court ordered the State to pay the trust an amount equal to the fair market value of lands conveyed from the trust as of the date of conveyance plus prejudgment interest from the date of each conveyance. Additionally, the superior court ordered a setoff for all money spent by the State on mental health services. Both sides appealed from that decision.

In October 1985, the Alaska Supreme Court upheld the superior court's ruling that the State had breached its obligations as trustee for the mental health lands trust established by Congress in 1956. State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). However, the Supreme Court invalidated the 1978 redesignation legislation and held that the trust should be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. Weiss, 706 P.2d at 684. The Supreme Court provided the following "guidance" to the superior court on remand:

> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of the sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that the expenditures exceeded the value of the land sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

Weiss, 706 P.2d at 684 (footnote omitted). The Court specifically declined to rule on questions raised in amicus briefs regarding the title held by the conveyancees and bona fide purchasers of mental health trust lands. See Weiss, 706 P.2d at 684 n.4.

In 1985, Weiss and Hilliker were the only class representatives. The Alaska Mental Health Association ["AMHA"] was permitted to intervene on January 24, 1986, and Mary C. Nanuwak and John Martin were added in June 1986.[7] The AMHA intervened because of its disagreement with the manner in which the original plaintiffs' attorney was conducting the case.[8] See Transcript of Oral Argument before the Alaska Supreme Court, at 2-4, 7 (Jan. 14, 1986). In particular, the AMHA believed that the

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[7]These intervening plaintiffs are represented by James B. Gottstein.

[8]Stephen Cowper was the original plaintiffs' attorney until October 1985. Aff. Cowper (June 2, 1986). William Council replaced Cowper, but withdrew in March 1986. David Walker has been the attorney for Weiss and Hilliker since 1986. See Order Granting Motion for Withdrawal by Attorney and Substitution (filed April 1, 1986).

validity of many of the State's conveyances of mental health land to third parties, such as municipalities, should be challenged, because the conveyances were the result of the State's breach of trust. Id. at 18, 27-29. The superior court permitted AMHA to file additional claims only to the extent that the claims related directly to the reconstitution of the trust ordered by the Alaska Supreme Court in State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). Order (June 19, 1986) (Judge Greene).

On March 31, 1987, the court permitted Bosel, Doulin, Goodwin, and Mayoc ("Bosel") to intervene in order to assure adequate representation for the developmentally disabled who were potential members of the class. Soon after intervening, the attorney for Bosel, Jeff Jessee, requested that mentally retarded and mentally defective individuals be declared to be among the intended beneficiaries of the trust and members of the class. Bosel's Motion for Partial Summary Judgment (July 14, 1987). Mr. Walker and Mr. Gottstein, attorneys for Weiss and AMHA respectively, opposed including as beneficiaries individuals not falling within the traditional definition of "mentally ill."

H.L., M.K., and Alaska Addiction Rehabilitation Services ("H.L."), on behalf of chronic alcoholics with psychoses, were permitted to intervene on June 1, 1987. Order Granting Intervention (June 1, 1987). H.L. sought to intervene "to assure better representation of the class" and to assure that the relief obtained in this action reflects the needs and characteristics of [chronic alcoholics]." H.L.'s Memorandum in Support of Motion to Intervene, at 1, 3 (May 13, 1987).

In 1988 the court ruled that Congress intended the trust to benefit at least those individuals suffering from a psychiatric illness who may require hospitalization and the mentally defective and retarded. Memorandum Decision and Order, at 16-17 (April 27, 1988). Included in this definition of trust beneficiaries were chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness. Id. at 17 n.6. The court also concluded that it was within the discretion of the

State to include other groups as recipients of services by the mental health program, but it was not within the discretion of the State to exclude the groups specifically identified by the court as intended beneficiaries. Id. at 17. The class definition was modified in 1994 to coincide with this definition of the beneficiaries as a result of this decision. The class is now defined as

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer from major mental illness, and such other persons needing mental health services as the legislature may determine.

Order Modifying Class Definition (Aug. 2, 1994).

The Supreme Court's "guidance" in its 1985 decision created almost as many issues as it resolved. The continuing uncertainty surrounding the validity of third party conveyances has been a major source of disagreement among the parties in evaluating the potential outcome of continued litigation. Because the setoff is applicable only to lands "sold," interpretation of the term "sold" within the context of the Supreme Court's decision has been another source of disagreement. It is in the interest of the class to include as few lands as possible within the definition of "sold," while it is in the State's interest to include as many lands as possible.[9] It is also hard to determine which specific state

[9]As a result, attorneys for the class have argued that the term includes only private third-party purchasers falling within the strictest possible definition of bona fide purchaser. The State, on the other hand, has suggested that any lands where an interest has been given or conveyed to others, including use of the land by another state agency, are "sold."

expenditures should be included in the setoff.[10] A simple return of all original trust lands still in state ownership presents problems for both the class and the State due to the impact on state forests, parks, and wildlife refuges, including the Chilkat Bald Eagle Preserve near Haines. These and other unresolved issues led the parties to spend several years pursuing proposals for settlement of this case.

B. Previous Settlement Attempts

Major attempts at settlement were made through legislation in 1987 (Chapter 48), 1990 (Chapter 210), and 1991 (Chapter 66). Chapter 48 and Chapter 210 were abandoned by the parties before the proposals were even presented to the court. The State withdrew from the Chapter 66 settlement after the court denied preliminary approval.

The Chapter 48 and Chapter 210 settlement proposals both involved the State's continued use of trust lands with the trust to be compensated with "rent." In Chapter 48, the trust was to be reconstituted entirely with land within legislatively designated areas and the original trust lands not within legislatively designated areas were to be released from trust status. The reconstituted trust was to have the same fair market value as the original one million acres of trust land. The State was to compensate the trust by "renting" the reconstituted trust lands at an annual amount of eight percent of the fair market value of the trust lands with the value of the lands to be redetermined every five years. Until fair market value of the lands was established, five percent of the State's unrestricted general fund revenues was to constitute the income of the trust. Chapter 48 also created the Alaska Mental Health Board to determine the needs of the mental health program and transmit funding recommendations to the governor and legislature.

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[10]For example, services specifically for alcoholics have not always been classified as mental health services, although chronic alcoholics suffering from psychosis are among the beneficiaries of the mental health lands trust. Additionally, the State has proposed inclusion of the cost of incarcerating people who are class members and violate the criminal laws.

The parties could not agree on the fair market value of the trust lands. The fair market value was estimated at $2.243 billion using procedures approved by the Interim Mental Health Trust Commission.[11] The State objected to this figure as grossly excessive. The Commissioner of DNR notified interested parties on April 17, 1990, that the State refused to follow the Commission's procedures for determining fair market value. An impasse resulted ending the consideration of the Chapter 48 settlement.

The Legislature then enacted a different proposal in Chapter 210, which eliminated the need for determination of land values. Chapter 210 provided for compensation to the trust in the amount of six percent of the State's annual unrestricted general revenues. Plaintiffs rejected this proposal, in part because they expected the State's general revenues to fall to a level at which the trust was unlikely to receive fair compensation for the value of the trust lands.

The State continued to convey original trust lands while various settlement proposals were negotiated. After the impasse in the Chapter 48 process was reached, plaintiffs obtained a preliminary injunction prohibiting the State from taking any further action on mental health lands. See Memorandum Decision and Order (July 9, 1990). The plaintiffs also refiled lis pendens on all original mental health lands. Between 4,000 and 6,000 land transactions were affected by the injunction and lis pendens. This placed many purchasers of small parcels in the difficult position of making all of their payments to the State for land purchased in state land sales, but being unable to obtain title to the land. Because of the cloud on their title, many of these individual purchasers found themselves unable to sell the land or obtain financing for construction. Original mental health trust lands have been closed to mineral activity since shortly after the Supreme Court's decision.

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[11]The Interim Mental Health Trust Commission was originally established under Chapter 132, SLA 1986.

In May 1991, after negotiations between the State and class counsel, the Alaska Legislature passed Chapter 66.[12] Chapter 66 established a procedure for reconstitution of the mental health lands trust through a process amounting to a land exchange between the State and the trust. It also contained amendments to legislation affecting some of the state's mental health programs and created a new agency, the Alaska Mental Health Trust Authority, to act as trustee. The Chapter 66 settlement was a land-based settlement without any significant cash component. During the negotiations leading to the enactment of Chapter 66, the State refused to consider a settlement with a large cash component. On April 6, 1992, a proposed settlement agreement incorporating Chapter 66 was signed by the State and three of the four attorneys representing the class, Mr. Walker, Mr. Gottstein, and Mr. Jessee.

The legality of portions of Chapter 66 and the 1992 proposed settlement agreement was challenged by intervening outside interests.[13] A group of public interest intervenors ["Public Interest Intervenors"][14] brought a broad-based constitutional attack on the parts of the Chapter 66 settlement which reconstituted the land trust.[15] Marathon Oil Company and Union Oil Company of California challenged portions of the settlement's reconstitution

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[12]Chapter 66 contained a provision that it would not become effective until this lawsuit was dismissed. Ch. 66 § 58, SLA 1991. That provision was changed during the special sessions of the 1994 legislature to provide that certain sections of Chapter 66 would become effective December 16, 1994 if the HB 201 settlement was approved and the lawsuit dismissed by December 15, 1994. Ch. 1 § 2-3, SSSLA 1994, amending Ch. 5 §§ 37 & 39, FSSLA 1994; Ch. 5 § 38, FSSLA 1994.

[13]The court's decisions on April 26 and May 14, 1993, with regard to these challenges have been appealed. The Alaska Supreme Court stayed the appeals when the State withdrew from the Chapter 66 settlement.

[14]The Public Interest Intervenors included the Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited. They were represented by attorneys for the Sierra Club Legal Defense Fund.

[15]The Public Interest Intervenors objected to the provisions for the land-based trust reconstitution contained in sections 54 through 57 of Chapter 66.

process which could affect their oil and gas leases on state land in Cook Inlet.

The Public Interest Intervenors' challenge attacked the constitutionality of many parts of Chapter 66. The challenge raised state constitutional issues of first impression in Alaska. The issues presented were very complex and briefing and decision substantially delayed consideration of the Chapter 66 settlement. The decision by this court invalidated the hypothecated lands list and held that state land laws were applicable to the trust unless the application of the law violated the Enabling Act. The settling parties had the right to withdraw from the agreement because they viewed these matters as crucial to the Chapter 66 settlement. The issues on appeal placed the entire settlement at risk.

The intervening oil companies challenged the legality of transfer of the State's interest as lessor in oil and gas rights on state land in Cook Inlet, as well as confidentiality provisions in the settlement agreement and the agreement on interim management of state lands. Their challenges also delayed the approval process and the issues on appeal threatened the very existence of the settlement.

Mr. Volland, attorney for H.L., opposed approval of the Chapter 66 settlement. Mr. Volland alleged that improprieties occurred during negotiations; an evidentiary hearing regarding negotiations was held in September 1992 and January 1993. Although Mr. Jessee, attorney for Bosel, signed the written agreement on April 6, 1992, he formally withdrew his support for it in December 1992. Mr. Walker, attorney for Weiss, and Mr. Gottstein, attorney for AMHA, both supported the Chapter 66 settlement.

On October 4, 1993, the court ruled that if a settlement received final approval in this case, all members of the class would

be bound by that decision, including those objecting to the settlement.[16]

On December 30, 1993, the court denied preliminary approval of the Chapter 66 settlement because there were serious deficiencies in the proposed settlement agreement. Memorandum Decision and Order, at 122 (Dec. 30, 1993). The class was not adequately protected by the agreement because it permitted any party to terminate the settlement agreement after final approval and dismissal of the case. Memorandum Decision and Order, at 121 (Dec. 30, 1993).

C. HB 201 Settlement

Negotiations for a new settlement began in January 1994. In February the State made an initial offer, which was discussed by all plaintiff groups and the third party intervenors.[17] The State invited counterproposals from any of the plaintiffs attorneys, and in March Mr. Volland submitted a counteroffer involving the formation of a permanent endowment fund for the state's mental health program. None of the other attorneys submitted a counteroffer.

On April 15, the State responded to Mr. Volland's counter-proposal with additional changes, including management of trust land by DNR. At an April 25 meeting attended by Mr. Volland, representatives of beneficiaries were generally supportive of the proposal with the exception of certain land management provisions. Management of trust land by DNR was opposed by many

[16]Class members who object to a settlement, however, may appeal a decision granting final approval.

[17]The Public Interest Intervenors, who were primarily interested in environmental impacts of development of lands in a reconstituted trust, played an active role in negotiating the contents of the list of lands to be included in the reconstituted trust under the new settlement. Public Interest Intervenors' Response, at 4 (July 1, 1994). Representatives from the coal industry and the oil and gas industry were also involved in the negotiation process. Mr. Volland sought to involve affected parties so that if a settlement was reached, it would not suffer the attacks from outside interests which plagued the Chapter 66 settlement.

beneficiaries or their representatives. Around this time, Mr. Walker and Mr. Gottstein indicated their dissatisfaction with the proposed settlement unless significant changes were made, but they continued to be involved in the negotiation process.

The State continued to pursue a contingency plan by advocating two sets of provisions, one for settlement and one for on-going litigation. The settlement provisions would become effective only if the case was dismissed by a specified date. Other provisions would become effective immediately and remain effective regardless of whether the case was dismissed. A few provisions would take effect immediately, but would be repealed if the case was dismissed by the specified date. In this way the State apparently hoped to better its litigation position if the settlement failed. These provisions and the deadline have been called "cram-down" provisions by objectors to the settlement. The inclusion of these provisions has created much ill will among many members of the class and their families, who view the State as acting unfairly.

HB 201 was passed in a special session immediately following the regular 1994 legislative session. It amended Chapter 66 and established a deadline of December 15, 1994, for final appellate and trial court approval in order for the settlement provisions to become effective. The accompanying appropriations bill, HB 371, was also passed in the special session. It appropriates $200 million for the trust fund. Governor Hickel signed both bills on June 23, 1994.[18]

After a four-day evidentiary hearing, the court found that the HB 201 settlement was within the range of possible approval and granted preliminary approval. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 58 (July 29, 1994). The proposed settlement was described in detail in the Memorandum Decision and Order

[18]HB 201 became Chapter 5, FSSLA 1994, and HB 371 became Chapter 6, FSSLA 1994. Because the label "HB 201" has been used in other documents, the court will continue to refer to this settlement as the "HB 201 settlement" in order to avoid confusion.

regarding preliminary approval.[19] Id. at 13-19. However, the court identified several problems which could potentially prevent final approval. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 31-41 (July 29, 1994). Governor Hickel called a second special session of the legislature in September 1994, to give the legislature an opportunity to amend HB 201 and HB 371 before the court made a decision regarding final approval. See Ch. 1, SSSLA 1994; Ch. 2, SSSLA 1994. The legislature passed the amendments as submitted by the Governor.

One of the major amendments made during the second special session changed the deadline and conditions for the effective date of the settlement provisions of HB 201. The legislature eliminated the requirement that all appeals must be resolved before the December 15 deadline in order for the settlement provisions to become effective and for the repeal of Chapter 66 to be prevented. See Ch. 1 § 2, SSSLA 1994, amending Ch. 66 § 58, SLA 1991, as repealed and reenacted by Ch. 5 § 37, FSSLA 1994. As long as final approval of the settlement and dismissal of the case by the superior court occurs no later than December 15, 1994, the settlement will become effective. While those opposed to settlement still may appeal final approval, such an appeal can no longer automatically destroy the entire settlement.

A second major change corrected and amended the lands lists incorporated into HB 201. See Ch. 1 §§ 4-7, SSSLA 1994; Ch. 5 § 40, FSSLA 1994 (HB 201). The corrections added 122 parcels with approximately 190,955 acres and deleted 85 parcels with approximately 124,209 acres. The Salcha mineral parcel[20]

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[19]Of course, this description does not include the September 1994 amendments to HB 201. Those amendments are described below.

[20]The original Salcha mineral parcel had not been tentatively approved for transfer from the federal government to the state because of military use of the parcel. In addition, there were reportedly hazardous waste sites located on the parcel that would have posed a significant liability risk for the trust.

was replaced with the mineral estate in nearby parcels, which present fewer problems and greater value.[21]

The court had expressed concern that the state land contract portfolio could not be sold for the $25 million stated in HB 371. In that event, the full $200 million would not be available for the trust fund as compensation for some of the original trust lands not returned. Alternative funding sources for the $200 million appropriation to the trust fund were identified in the event the sources originally designated in HB 371 prove to be inadequate. See Ch. 2, SSSLA 1994. This was enacted to resolve the uncertainty in whether the class would get the benefit of their bargain with regard to the $200 million cash payment to the trust.

D. Description of HB 201 Settlement

The settlement components of HB 201 are contained in sections 3 through 9, 12 through 40, 43, 46, 47, 50, and 51. See Ch. 5, FSSLA 1994 and amendments in Ch. 1, SSSLA 1994. HB 371 contains a total appropriation of $200 million to the trust fund. See Ch. 6, FSSLA 1994 and amendments in Ch. 2, SSSLA 1994. The settlement components in Chapter 66 are contained in sections 2 through 48, 51, 52, and 58.[22] Ch. 66, SLA 1991.

Section 40 of HB 201 reconstitutes the trust with a combination of "Original Mental Health Land" and "Other State Land."[23] Ch. 5 § 40(a), FSSLA 1994. Some of the approximately

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[21]The parcels replacing the Salcha mineral parcel were part of a land exchange agreement between the State and Messrs. Volland and Jessee. See H.L.'s Notice of Resolution of Salcha Exchange (Sept. 22, 1994).

[22]HB 201 repealed parts of Chapter 66: AS 37.14.009(b) in section 10; AS 37.14.036(c) in section 11; AS 47.30.031(b)(2) in section 26; sections 49, 50, and 53 through 57. Ch. 5 § 39, FSSLA 1994.

[23]For the purpose of reconstituting the trust, the following land was designated in HB 201 as mental health trust land:

(1) the original mental health land listed in "Original Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended by the additions and deletions listed in the September 23, 1994, addendum to the April 28, 1994, list described in this paragraph, both of which

995,502 acres in the reconstituted trust will not be held in fee simple.[24] Only the subsurface estate of approximately 341,421 acres is conveyed to the reconstituted trust. Only the hydrocarbon (oil and gas) interest of approximately 104,286 acres is conveyed to the reconstituted trust. Approximately 549,795 acres in fee simple are conveyed to the reconstituted trust.

Approximately 568,814 acres of the 995,502 acres in the reconstituted trust are "Original Mental Health Land." This "Original Mental Health Land," which is returned to the trust, is composed of approximately 434,456 acres in fee simple, 55,792 acres of only subsurface estate, and 78,566 acres of only hydrocarbon interest.[25] The "Original Mental Health Land" in the reconstituted trust is primarily located near the urban areas in Southeast Alaska, in the Anchorage/Kenai Peninsula area, and near Cape Yakataga, Tyonek, Lake Minchumina, Healy, Anderson, Nenana, and Fairbanks.

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are located in the office of the director of lands, Department of Natural Resources, in Anchorage, Alaska; and

> (2) the state land listed in "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended by the additions and deletions listed in the September 23, 1994, addendum to the April 28, 1994, list described in this paragraph, both of which are located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

Ch. 5 § 40(a), FSSLA 1994, as amended by Ch. 1 § 4, SSSLA 1994.

[24]A fee simple estate includes the entire bundle of possible property rights. It contains both the surface and subsurface estates.

[25]The subsurface estate or hydrocarbon interests are subsurface interests conveyed to the Trust Authority where the surface estate has been conveyed to a third party or another state use, but the surface use is not incompatible with subsurface development. For example, mineral exploration and development is a permitted activity in the Matanuska Valley Moose Range. Thus, the subsurface rights to original mental health trust lands in the Moose Range are returned to the trust.

Under the HB 201 settlement, approximately 556,392 acres[26] of original mental health trust lands will not be returned to the trust. Compensation for these non-returned lands ["NRTL's"] will be composed of: (1) approximately 426,688 acres of "Other State Lands," (2) $200 million placed in a trust fund established for the monetary corpus of the trust, (3) establishment of an Alaska Mental Health Trust Authority to act as trustee, (4) changes in the budgeting process for mental health programs, and (5) the program improvements outlined in Chapter 66, SLA 1991.

The "Other State Lands" which are conveyed include approximately 115,339 acres in fee simple, approximately 285,629 acres of subsurface estate only land, and approximately 25,720 acres in hydrocarbon interest only land. The subsurface and fee simple interests in "Other State Lands" are located primarily southeast of Chena Hot Springs, just north of Fairbanks, northwest of McGrath, in the Livengood area,[27] around Delta Junction, near Tok, northwest of Haines, north of Sitka, and numerous other locations in Southcentral and Southeast Alaska. The hydrocarbon interests are located in the lower Kenai peninsula and lower Susitna Valley. The Salcha replacement mineral parcel comprises more than half the acreage of subsurface estate only land in the "Other State Land" category.[28]

The Settlement Agreement submitted to the court on June 10, 1994, requires most of the land to be conveyed to the Trust Authority prior to final approval of the settlement. Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994). The Agreement

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[26]The Non-Returned Trust Lands are composed of approximately 423,000 acres in fee simple and approximately 133,500 acres of surface estate.

[27]The Livengood area has been the location of mining activity in the past.

[28]A replacement parcel was chosen because there was no assurance that the federal government would ever convey the original Salcha parcel to the State. The replacement parcel is larger than the original parcel and has a value equal to or greater than the original parcel. The replacement parcel was substituted for the original on the list of "Other State Land To Be Designated as Mental Health Trust Land" as part of the amendments passed during the Second Special Session of the Legislature in September 1994.

calls for the State to tender to the court the deeds for conveying to the trust authority the lands to be included in the reconstituted trust prior to dismissal of this action.[29] Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994). Accordingly, the State tendered non-recordable deeds with attached plats on the last day of the fairness hearing.

DNR normally issues patents, which technically are a form of quitclaim deed. The HB 201 calls for the State to issue quitclaim deeds to Trust Authority rather than warranty deeds. However, the State has warranted in the Settlement Agreement that it has legal authorization to convey the land to the Trust Authority. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994). If the warranty is violated, the trust will be compensated with other land. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994).

Mental health trust land selections not yet conveyed to the State by the federal government will be conveyed to the Trust Authority as the State receives them. DNR has agreed to consult the Trust Authority when the annual conveyance priorities are submitted to the Bureau of Land Management. Settlement Agreement, art. IV, § 9, at 11 (June 10, 1994). If such land parcels are different from those described on the lists referenced in HB 201, the State will compensate the trust with other land of a similar character, equal value, and similar revenue-producing potential. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994).

The Alaska Mental Health Trust Authority, which is created by Chapter 66 to act as trustee for the mental health lands

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[29]The Agreement acknowledges that full legal descriptions may not be available at the time the action is dismissed. Settlement Agreement, art. IV, § 1, at 7. However, the State has agreed to use its best efforts to complete recordable deeds for delivery to the trust authority as soon as practicable after dismissal. Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994). The interim deeds describe parcels by number and reference to maps attached to the interim deeds. The State will bear the recording costs for all documents required by the settlement. Settlement Agreement, art. IV, § 5, at 9-10 (June 10, 1994).

trust,[30] "has a fiduciary obligation to ensure that the assets of the trust are managed consistent with the requirements of the Alaska Mental Health Enabling Act." Ch. 5 § 9, FSSLA 1994; Ch. 66 § 10, SLA 1991, as amended by Ch. 5 § 8, FSSLA 1994; Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 26, FSSLA 1994. The Trust Authority is required to contract with DNR to manage the land assets of the trust. Ch. 5 § 9, FSSLA 1994. A separate unit of DNR must be established whose sole assignment will be to manage the reconstituted land corpus of the trust. Ch. 5 § 22, FSLA 1994.

Section 17 of HB 201 lists the general standards applicable to DNR's management of lands in the reconstituted trust:

> (a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).
>
> (b) Subject to (a) of this section, the department
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> > (1) shall manage mental health trust land under those provisions of law applicable to other state land;
> >
> > (2) may exchange other state land for mental health trust land under procedures set out in AS 38.50; and
> >
> > (3) may correct errors or omissions in the legal descriptions of mental health trust land.
>
> (c) The commissioner [of DNR] shall adopt regulations under AS 44.62 (Administrative

[30]A seven-person board of trustees will govern the Trust Authority. Ch. 66 § 26, SLA 1994 (to be codified as AS 47.30.016(b)). Board members must be appointed by the governor and confirmed by the legislature. Ch. 5 § 24, FSSLA 1994.

> Procedures Act) to implement this section. The regulations adopted under this subsection must, at a minimum, address
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> (1) maintenance of the trust land base;
>
> (2) management for the benefit of the trust;
>
> (3) management for long-term sustained yield of products from the land; and
>
> (4) management for multiple use of trust land.

Ch. 5 § 17, FSSLA 1994 (to be codified as AS 38.05.801). The four management provisions which must be addressed in the regulations are based on a law review article discussing management principles for public trust lands. See Fairfax, Souder, & Goldenman, The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 900-908 (1992). The regulations for DNR's management of trust lands will be adopted through the usual public rulemaking procedures during which the beneficiaries and the public will have an opportunity to comment. See Ch. 5 § 17, FSSLA 1994 (to be codified as AS 38.05.801(c)). In addition, DNR is required to consult the Trust Authority before adopting regulations for the management of trust land. See Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(2)(B)).

The Settlement Agreement requires DNR to "consult a transition team of representatives from the beneficiary community" during the development of the initial policies and procedures for the DNR unit managing trust land. Settlement Agreement, art. V, § 6, at 13-14 (June 10, 1994). DNR Commissioner Harry Noah has been consulting with the transition team. This arrangement seems to be working well. Final Hearing (Oct. 25, 1994). Section 9 of HB 201 includes DNR's general obligations to the Trust

Authority. When DNR manages trust land under a contract with the Trust Authority, DNR is required to:

> (A) manage in conformity with AS 38.05.801;
>
> (B) consult with the authority before adopting regulations under AS 38.05.801(c);
>
> (C) provide notice to, and consult with, the authority regarding all proposed actions subject to public notice under AS 38.05.945 before giving that public notice;
>
> (D) annually provide the authority with a report including
>
> > (i) a description of all land management activities undertaken under this section during the prior year;
> >
> > (ii) an accounting of all income and proceeds generated from mental health trust land;
> >
> > (iii) an explanation of the manner in which the income and proceeds were allocated between the mental health trust fund and the mental health trust income account; and
>
> (E) obtain the approval of the authority before exchanging mental health trust land under AS 38.05.801(b)(2).

Ch. 5 § 9, FSSLA 1994.

HB 201 designates the Alaska Permanent Fund Corporation to manage the investment of the monetary corpus of

the trust, the "mental health trust fund," which will receive the $200 million cash payment from the State.[31] Ch. 5 §§ 3 and 9, FSSLA 1994. Both DNR and the Permanent Fund Corporation must keep the Trust Authority informed with regularly published reports.[32] Ch. 5 §§ 3 and 9, FSSLA 1994.

Earnings from the trust fund and the trust lands must be deposited in a trust income account. Ch. 5 §§ 3, 14, and 15, FSSLA 1994. The Trust Authority will administer the income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.039(a)). The Trust Authority is required to use money from the trust income account for providing an integrated comprehensive mental health program, offsetting the effects of inflation on the trust fund, and meeting the necessary administrative expenses of the Trust Authority. Ch. 5 § 28, FSSLA 1994 (to be codified as AS 47.30.056(a)). Among other things, the money in the income account also may be used to reimburse the Permanent Fund Corporation and DNR for the cost of managing trust assets, to award grants and contracts for mental health programs, to obtain private and federal grants and to solicit gifts, bequests, and contributions for the mental health program. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041(a)).

The Settlement Agreement expressly states the Trust Authority will have the power to allocate money from the trust income account without further legislative involvement.[33]

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[31]The principal of the trust fund is to be "retained perpetually in the fund for investment by the Alaska Permanent Fund Corporation." Ch. 5 § 14 (to be codified as AS 37.14.035(a)). The Trust Authority is required to contract with the Alaska Permanent Fund Corporation for management of the mental health trust fund. Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(3)).

[32]DNR must provide an annual report to the Trust Authority that includes: (1) a description of all land management activities undertaken during the prior year; (2) an accounting of all income and proceeds generated from mental health trust land; and (3) an explanation of the manner in which the income and proceeds were allocated between the corpus and income of the trust. Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(2)(D)).

[33]

Settlement Agreement, art. V, § 4, at 12 (June 10, 1994). Section 16 of HB 201 states that the income account will be administered by the Trust Authority and lists the specific uses for which money from the trust income account may be used and the requirements for grants and contracts awarded by the Trust Authority to further the mental health program.[34] See Ch. 5 § 16, FSSLA 1994.

Under Chapter 66 and HB 201, each of the four major beneficiary groups will be represented by their own advocacy group for purposes of planning services and making budget recommendations to the Trust Authority. See, e.g., Ch. 66 § 26 (to be codified as AS 47.30.036(2)-(3)) and § 39 (to be codified as AS 47.30.666), SLA 1991, as amended by Ch. 5 § 35, FSSLA 1994. The four advocacy groups are the Older Alaskans Commission, the Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, and the Advisory Board on Alcoholism and Drug Abuse. See Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.016(b)(2)(A)-(D)). A member from each group also will be on the panel established to advise the governor regarding appointments to the board of trustees of the Trust Authority. The six-member panel will consist of one person selected by each of the following: (1) the Alaska Mental

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> Except for the administrative expenses of the Authority subject to the Executive Budget Act under Section 16 of HB 201, and to the fullest extent consistent with the Alaska Constitution, the Trust Authority may use the money in the income account for the purposes authorized in Section 16 of HB 201 without, and free of, further legislative appropriation.

Settlement Agreement, art. V, § 4, at 12 (June 10, 1994).

[34]Attorneys for Weiss and AMHA submitted a draft letter of intent to the legislature in the Second Special Session, stating that the legislature intended the Trust Authority to have the power to make expenditures from the trust income account without legislative appropriation. Final Hearing, Weiss Exh. 18. The letter was not adopted by the legislature. The court does not believe that the legislature's refusal to adopt the proposed letter of intent can be interpreted as an expression of contrary legislative intent. The Second Special Session was called for a particular purpose; the attorney general's office ultimately determined that the letter of intent went beyond the call.

Health Board, (2) the Governor's Council on Disabilities and Special Education, (3) the Advisory Board on Alcoholism and Drug Abuse, (4) the Older Alaskans Commission, (5) the Alaska Native Health Board, and (6) the Trust Authority. Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 24, FSSLA 1994 (to be codified as AS 47.30.016(b)). The Trust Authority must consider the recommendations submitted by the four advocacy groups and coordinate the state agencies involved with the mental health program when forming budget recommendations for the state's comprehensive mental health program. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.036(2)-(3)).

HB 201 requires the governor to submit to the legislature a separate appropriations bill limited to the comprehensive mental health program. Ch. 5 § 4, FSSLA 1994. Similarly, the legislature is required to pass appropriations for the program in a separate bill. Ch. 5 § 7, FSSLA 1994. If the bill submitted by the governor or passed by the legislature differs from the Trust Authority's recommendations for appropriations from the state's general fund, a report must accompany the bill explaining the reasons for the differences. Ch. 5 §§ 5 and 7, FSSLA 1994. The governor must make a similar explanation of any veto of an appropriation for the state's comprehensive mental health program. Ch. 5 § 6, FSSLA 1994.

By January 1, 1996, the Trust Authority must have adopted regulations regarding (1) persons who are to receive services funded by trust income and (2) the services and facilities upon which expenditures are to be made from money in the trust income account.[35] Ch. 5 § 43, FSSLA 1994. The Trust Authority's task is aided by the detailed definitions in Chapter 66. See Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(b)-(j)).[36] The persons who are to receive services funded by the trust income account, the

[35]The Trust Authority also must publish estimates regarding the number of persons in need of the services funded by the trust income account and projections of the necessary expenditures for from the trust income account by January 1, 1996. Ch. 5 § 43, FSSLA 1994.

[36]AS 47.30.056(a) added by Chapter 66 was amended by section 28 of HB 201.

beneficiaries, are defined by several diagnoses within each of the four beneficiary groups identified by the court in 1988. See Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(d)-(g)). Priority in service delivery among the beneficiaries must be given to individuals who (A) may require or are at risk of hospitalization, or (B) experience such major impairment of self-care, self-direction, or social and economic functioning that they require continuing or intensive services. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(b)-(c)). Chapter 66 defines "integrated comprehensive mental health program" in terms of a wide variety of possible services. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(i)). Services are also addressed in amendments to the Community Mental Health Services Act, which focuses on community based services. Ch. 66 §§ 28-35, SLA 1991 (to be codified as AS 47.30.520-.610), as amended by Ch. 5 §§ 30-32, FSSLA 1994.

Chapter 66 and HB 201 both amend AS 47.30.660, which outlines the general responsibilities of the Department of Health and Social Services ("DHSS") with regard to the state's mental health program. See Ch. 66 § 36, SLA 1991; Ch. 5 § 33, FSSLA 1994. Chapter 66 requires DHSS to plan for "an integrated comprehensive mental health program" in conjunction with the Trust Authority and, through the Division of Mental Health and Developmental Disabilities, administer a comprehensive program of services. Ch. 66 § 36, SLA 1991. HB 201 clarified that DHSS's duty to implement an integrated comprehensive system of mental health care which meets the needs of trust beneficiaries was constrained by "the limits of money appropriated for that purpose and using grants and contracts that are to be paid for from the mental health trust income account." Ch. 5 § 33, FSSLA 1994 (to be codified as AS 47.30.660(a)(3)).

III. DEFINITION OF THE CLASS

This case was certified as a class action under Alaska Civil Rule 23(b)(2). Order Certifying Action as Class Suit under Civil Rule 23(b)(2) (Jan. 26, 1983) (Judge Taylor). Class action lawsuits

are "(b)(2)" actions when only injunctive or declaratory relief with respect to the class as a whole has been requested, and no monetary relief will be distributed to individual class members.[37] The relief sought in this case is reconstitution of the mental health lands trust with the hope that this will lead to improved state mental health services. Individual compensation to class members has never been contemplated. Relief in a (b)(2) action is focused on the class as a whole, therefore class members do not have the right to opt out of the action or a settlement of it. In addition, no member or segment of the class has veto power over a settlement, although the court must carefully consider substantial objections as an indication that a settlement might not be fair to the class.

In 1983, the class was defined in accordance with the original complaint, which stated that the plaintiffs were recipients of state mental health services who needed continuing services that were not available in the State of Alaska. Order Certifying Action as Class Suit under Civil Rule 23(b)(2) (Jan. 26, 1983) (Judge Taylor); Complaint, at 1 (Nov. 26, 1982). In 1987, Bosel moved for a declaration that mentally retarded and mentally defective individuals were among the intended beneficiaries of the trust when it was established in 1956. See Bosel's Motion for Partial Summary Judgment (July 14, 1987). In response to Bosel's motion and

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[37]The pertinent portions of Alaska Civil Rule 23 provide:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . .
>
> (2) The party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

extensive briefing, the court determined that the beneficiaries were composed of at least "those individuals suffering from psychiatric illness who may require hospitalization and the mentally defective and retarded" including "chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness." Memorandum Decision and Order, at 17 & n.6 (April 27, 1988).[38]

The class definition was modified August 2, 1994. The class was redefined as

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer major mental illness, and such other persons needing mental health services as the legislature may determine.

Order Modifying Class Definition, at 1-2 (Aug. 2, 1994). Section 26 of Chapter 66, which will become effective Dec. 16, 1994, defines each of the four main categories of beneficiaries. Ch. 66 § 26, SLA 1991.[39]

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[38]In addition, the court concluded that it was within the discretion of the legislature to include other groups as recipients of services by mental health programs, as long as the groups specifically described in the court's order were not excluded. Memorandum Decision and Order, at 17 (April 27, 1988).

[39]In section 26, "the mentally ill" includes persons with: (1) schizophrenia; (2) delusional (paranoid) disorder; (3) mood disorders; (4) anxiety disorders; (5) somatoform disorders; (6) organic mental disorders; (7) personality disorders; (8) dissociative disorders; (9) other psychotic or severe and persistent mental disorders manifested by behavioral changes and symptoms of comparable severity to those manifested by persons with the other listed mental disorders; (10) persons who have been diagnosed by a licensed psychologist, psychiatrist, or physician licensed to practice medicine in the state and, as a result of the diagnosis, have been

IV. NOTICE

Alaska Civil Rule 23(e) requires that notice of a settlement be sent to members of the class in whatever manner the court directs.[40] Alaska R. Civ. P. 23(e). Notice to the class of a proposed settlement and the fairness hearing assures class members (1) an opportunity to support or oppose the settlement and to alert the court to provisions in the settlement that may be contrary to the interests of the class as a whole or subgroups within the class; and (2) that their "integrity and right to express views and be heard on matters of vital personal interest has not been violated by others

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determined to have a childhood disorder manifested by behaviors or symptoms suggesting risk of developing a mental disorder listed above. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(d)).

"Mentally defective and retarded" includes persons with: (1) cerebral palsy; (2) epilepsy; (3) mental retardation; (4) autistic disorder; (5) severe organic brain impairment; (6) significant developmental delay during early childhood indicating risk of developing a disorder listed above; (7) other severe and persistent mental disorders manifested by behaviors and symptoms similar to those manifested by persons with disorders listed above. Ch. 66 § 26 SLA 1991 (to be codified as AS 47.30.056(e)).

"Chronic alcoholics suffering from psychoses" includes persons with: (1) alcohol withdrawal delirium (delirium tremens); (2) alcohol hallucinosis; (3) alcohol amnestic disorder; (4) dementia associated with alcoholism; (5) alcohol-induced organic mental disorder; (6) alcoholic depressive disorder; (7) other severe and persistent disorders associated with a history of prolonged or excessive drinking or episodes of drinking out of control and manifested by behavioral changes and symptoms similar to those manifested by persons with the disorders listed above. Ch. 66 § 26 SLA 1991 (to be codified as AS 47.30.056(f)).

"Senile people who as a result of their senility suffer major mental illness" includes persons with: (1) primary degenerative dementia of the Alzheimer type; (2) multi-infarct dementia; (3) senile dementia; (4) presenile dementia; (5) other severe and persistent mental disorders manifested by behaviors and symptoms similar to those manifested by persons with the disorders listed above. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(g)).

[40]The Civil Rule 23(e) notice requirement is based in part on due process because the settlement of a class action will have res judicata effects on all class members. In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 759 (E.D.N.Y. 1984), citing Grunin v. International House of Pancakes, 513 F.2d 114, 120 (8th Cir.), cert. denied, 423 U.S. 864, 96 S. Ct. 124, 46 L.Ed.2d 93 (1975).

who abrogated to themselves the power to speak and bind without consultation and consent." In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 758 (E.D.N.Y. 1984).

Individual notice to every class member of a (b)(2) class is not necessary as long as a representative portion of the class or their guardians are contacted, because members of the class cannot opt out of the class or settlement and identification of all class members may be difficult. See, e.g., Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 963 (3rd Cir. 1983); Harris v. Pernsley, 654 F. Supp. 1042, 1048 (E.D. Pa. 1987). Sometimes notice by publication is sufficient to satisfy constitutional due process requirements in a (b)(2) action. See, e.g., Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980). The court must consider the nature of the class and the case when the court decides the appropriate form and content of notice and the method of distribution. This is a reason why the specific manner of giving notice of a proposed settlement is left to the discretion of the trial court. The court decided that notice only by publication would have been inadequate in this case, given the limitations and special needs of many class members.

In the present case, the balance between providing enough information for the class to evaluate the settlement and making the notice understandable to as many class members as possible was a difficult one. See Newberg on Class Actions § 8.32, at 8-103 to 8-104 (3d ed. 1992). The text was kept as simple and as short as possible given the constraints of accuracy and completeness. See id. A few written comments stated the notice did not provide sufficient information. Others complained that the notice was too long and complex for most class members to understand.

Other sources of information were listed for those who wanted more information. The names and phone numbers of attorneys for the class were provided in the notice. The court also made available a public information sheet explaining that the court file for this case encompassed over 100 volumes and listing the

volumes which contained documents relevant to the HB 201 settlement.

The court recognized that the notice would be too detailed for some class members. Family members, guardians, or other advocates for class members were relied upon to explain the notice to class members or otherwise to represent the interests of individual class members.

The fact that the class was defined in terms of those who suffer from mental illness, alcoholism, mental retardation, and senility made direct notice to individually identified class members impossible. The stigma that mental illness continues to carry in American society raises issues of class members' right to privacy under article I, section 22 of the Alaska Constitution. The Alaska Supreme Court has recognized that psychiatric or psychological treatment is information which patients would normally seek to keep private. Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469, 480 (Alaska 1977). The simple release of names and addresses of patients by mental health service providers would reveal that those individuals had sought treatment for a mental illness. This would violate the patients' right to privacy and the confidentiality of communication between physician/psychotherapist and patient. See Falcon, 570 P.2d at 479-80; accord Ziegler v. Superior Court for the County of Pima, 656 P.2d 1251, 1255-56 (Ariz. Ct. App. 1982).

Direct notice to all class members was impossible for other reasons as well. The current addresses of past trust beneficiaries could be difficult to ascertain and individual identification of future beneficiaries who are not presently receiving services would be impossible. See Harris v. Pernsley, 654 F.Supp. at 1048. The solution proposed by some of the parties and adopted by the court was a mass mailing to all Alaskan addresses. This provided actual notice to approximately 270,000 addresses.

The mass mailing had the advantage of reaching potential class members in even the smallest villages served by the United

States Postal Service. Publication alone could not accomplish this. In addition, the mailed notice included a comment form to encourage recipients of the notice to comment on the proposed settlement. On August 2, 1994 the court approved the text of the notice to be given by mass mailing. By August 19, 1994, the notices had been sent by third-class mail. A copy of the notice is in Appendix A. The plaintiffs' attorneys provided versions of the notice on audio cassette, in Braille, large print, Spanish, Filipino, Inupiaq, and Yupik. These versions of the notice were made available upon request or in public areas along with the standard English version.

Beginning August 12, 1994, the State published the court-approved notice one time per week for three consecutive weeks in each of Alaska's 23 largest newspapers, with four minor variations in this schedule.[41] The complete text of the notice was published in a legal advertisement along with a display advertisement located in another part of the same edition drawing attention to the legal notice. The court approved the text of a large display advertisement on September 23, 1994. The advertisement was four columns (eight inches) wide by twelve inches high. The display advertisement was published four consecutive weeks in the Sunday edition of the Anchorage Daily News, the Fairbanks Daily News-Miner, and the Juneau Empire beginning September 25 and continuing through October 16, 1994.

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[41]The court's order required publication in the 22 largest newspapers. The State ranked newspapers by total paid subscribers as listed by the Alaska Journal of Commerce Book of Lists 1994 at page 21. When the notice was published, however, the Prince William Sounder, had divided into two newspapers, the Valdez Vanguard and the Cordova Times. This brought the total to 23 newspapers in which the notice was published.

The advertisements were printed in the Alaska Journal of Commerce on August 22 and 29, and September 5, 1994. Because the Tundra Times publishes every other Wednesday, advertisements were printed on August 24, September 7 and September 21, 1994. The Senior Voice is published only monthly, and advertisements were published in the September and October issues. The Southeast Alaska Business Journal also publishes monthly, and advertisements were published in the August and September issues.

Public service announcements were sent to all radio and television stations in Alaska by the middle of September. The public service announcements briefly informed listeners of the existence of the settlement and where more information could be obtained. An additional information sheet written by the State was available at DNR Information Offices and Legislative Information Offices.

The State was also required to send notices to providers of mental health, alcoholism, and homeless services by the end of August 1994. Accordingly, around August 24, 1994, the State sent notices to approximately 1,400 providers[42] of mental health, alcoholism, and homeless services, including shelters, soup kitchens and other programs designed to assist homeless people. Posters accompanying the notices were made from enlarged versions of the notice. A letter was included requesting the provider to distribute the notices to current clients and other interested persons. Notices were also provided to and distributed by the Alaska Department of Corrections in the state's correctional facilities in order to notify those inmates who are also class members.

Plaintiffs' attorneys and advocacy groups held a few meetings for beneficiaries and their families or guardians to explain the settlement and to answer questions about it. In addition, because this is a high-profile case, news reports in both the print and broadcast media provided the public with some information about the proposed settlement and the legislature's actions with regard to the settlement.

Notice to the class started in mid-August and lasted until October 16, 1994, a total of nine weeks. The period for receiving written comments continued through October 21, 1994. Notice was first sent ten weeks prior to October 24, when the final

[42]The list of providers was compiled by Jeff Jessee, counsel for Bosel.

approval hearing began in Anchorage. Therefore, a reasonable[43] time period was provided between notice and final hearing, during which class members and their families or other representatives could investigate the settlement further and reflect on the matter before taking a position. See In re Agent Orange, 597 F. Supp. at 759.

V. FINAL APPROVAL

A. Standard

Final approval requires that the settlement as a whole be "fair, adequate, and reasonable."[44] Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992); Newberg on Class Actions § 11.41, at 11-91 (3d ed. 1992). However, a "settlement need not provide the best or speediest relief imaginable to be fair, adequate, and reasonable." Officers for Justice, 688 F.2d 615, 636 (9th Cir. 1982). In evaluating the fairness of a settlement, it must be remembered that "compromise is the essence of a settlement."

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[43]What constitutes a "reasonable time" varies from case to case. Agent Orange, 597 F. Supp. at 759; see Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). The length of time seems to vary from approximately two weeks to three months. See, e.g., Ruiz v. McKaskle, 724 F.2d 1149, 1152 (5th Cir. 1984) (30 days); Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 961 (3rd Cir. 1983) (one month); Williams, 720 F.2d at 921 (two weeks is a minimum); Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir. 1982)(six weeks); Mendoza v. United States, 623 F.2d 1338, 1348 (9th Cir. 1980) (nearly a month); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977) (26 days); Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 838 (9th Cir. 1976) (one month); Grunin v. International House of Pancakes, 513 F.2d at 121 (19 days); Agent Orange, 597 F.Supp. at 759-60 (three months); Bronson v. Board of Education, 604 F. Supp. 68, 72 (S.D. Ohio 1984) (approximately 20 days).

[44]Preliminary approval is not a fairness determination. It is a finding by the court that the proposed settlement is sufficiently within the range of possible approval to justify notifying of the class and proceeding with a final approval hearing. Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980). Final approval of the settlement remains discretionary with the court even after preliminary approval is granted. See Newberg on Class Actions §11.41, at 11-88 (3d ed. 1992).

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).[45] Every concern of the class need not be satisfied in order for a settlement to be fair. Alliance to End Repression v. City of Chicago, 91 F.R.D. 182, 195 (N.D. Ill. 1981). A fair settlement may fall anywhere within a broad range of upper and lower limits. See Alliance to End Repression, 91 F.R.D. at 195.

Factors which courts usually consider in deciding whether to grant final approval include:

> (A) comparison between the likely result of litigation and the remedy in the settlement;
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> (B) expense, complexity, and likely duration of further litigation;
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> (C) reaction of the class to the settlement, number of objectors, and nature of objections;
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> (D) experience and views of counsel;
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> (E) defendant's ability to pay (feasibility of settlement);
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> (F) extent of discovery completed; and
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> (G) presence of collusion in settlement negotiations.[46]

See Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; Malchman v. Davis, 706 F.2d 426, 433-34 (2nd Cir. 1983); Armstrong v.

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[45]A settlement may compromise some potential remedies available to the class, if as a whole the settlement is fair, reasonable, and adequate. Armstrong v. Board of School Directors, 616 F.2d 305, 317 (7th Cir. 1980).

[46]The court conducted an evidentiary hearing in July concerning the presence or absence of collusion in reaching the settlement. The court found no evidence of collusion in the negotiations. No further evidence or allegations regarding the conduct of negotiations have arisen. The court will not discuss this factor further. The earlier determination of no collusion stands.

Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); Newberg on Class Actions § 11.43, at 11-97. The relative degree of importance attached to each factor depends upon the claims, facts, and circumstances of each case.[47] Officers of Justice v. Civil Service Comm'n., 688 F.2d 615, 625 (9th Cir. 1982).

Most of these factors were discussed in the court's decision granting preliminary approval. See Memorandum Decision and Order, at 45-57 (July 29, 1994). The court specifically found no evidence of collusion or any other significant impropriety in the negotiation process. Id. at 23-30, 57. The preliminary approval decision also identified several concerns of the court that potentially could prevent final approval. Id. at 31-42. Therefore, the court has focused on these factors in deciding whether to grant final approval: (1) the extent to which problems identified by the court in the decision regarding preliminary approval have been resolved; (2) a comparison between the settlement and further litigation[48] including the expense, duration, and complexity of trial litigation; and (3) the nature and amount of class opposition to the settlement. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 31-57 (July 29, 1994). Other factors are discussed more briefly.

It must be remembered that the court is reviewing a class settlement proposal rather than ordering a remedy in a litigated case. Armstrong, 616 F.2d at 314-15. The court did not undertake the kind of detailed and thorough investigation that it would undertake if it were actually trying the case.[49] See Armstrong, 616

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[47]For example, where no monetary relief is sought, the defendant's ability to pay of no importance, although the feasibility of the requested relief may remain relevant.

[48]This includes an evaluation of the difficulties in proving the plaintiffs' claims to land in which third-parties have an interest and the strength of the State's claim to a setoff for past mental health expenditures.

[49]In this case, the final hearing lasted two full weeks. However, a trial of the same factual issues undoubtedly would have lasted much longer, and a trial of the entire case would involve many additional factual and legal issues. Cf. Officers of Justice, 688 F.2d at 625 (final hearing should not be turned into a trial or rehearsal for trial on the merits).

F.2d at 315. Nothing in this Memorandum Decision can be viewed as a judgment with regard to the ultimate factual and legal issues underlying the merits of the present litigation.

The court's role in determining whether a settlement is fair, adequate, and reasonable is limited to the minimum necessary to protect the interests of the class. Armstrong, 616 F.2d at 315; Holden v. Burlington Northern, 665 F.Supp. 1398, 1406 (D. Minn. 1987). A court may not substitute its own judgment regarding the optimal possible settlement for the judgment of the litigants and their counsel. Armstrong, 616 F.2d at 315; In re Agent Orange, 597 F.Supp. at 759. A proposed settlement should not be judged against some hypothetical ideal of what might have been achieved in the best possible negotiations. Officers of Justice, 688 F.2d at 625; In re Agent Orange, 597 F.Supp. at 762. It also should not be judged in comparison with the maximum possible recovery if the class succeeded in all claims. See In re Agent Orange, 597 F.Supp. at 762. The risks accompanying continuation of litigation must be considered simultaneously with the strengths of class' case. Holden v. Burlington Northern, Inc., 665 F.Supp. at 1408; see also In re Agent Orange, 597 F.Supp. at 762 (settlement judged in light of the strengths and weaknesses of plaintiffs' case"). A settlement is a bilateral compromise in which certain rights or benefits are given up in return for others, where both sides gain as well as lose something. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1135 (7th Cir. 1979).

Settlement involves compromise on both sides even when the liability of the defendant has already been established, as it has here. There may be a tendency for many class members to object to any compromise in the remedial portion of a case once liability is established. See Armstrong, 616 F.2d at 316. Understandably, a compromise on the remedy may appear to be allowing the defendant to escape with little penalty while leaving the class inadequately compensated. Yet in some class actions, such as this one, the remedial portion of the case can surpass the liability portion in terms of complexity and duration. See Armstrong, 616

F.2d at 324. In such cases, compromise on the remedial issue after the defendant is held to be liable may indeed be quite reasonable.

B. Burden of Proof

The parties do not agree regarding the appropriate burden of proof[50] for final approval.[51] The Alaska Supreme Court has not ruled on this specific issue.

Proponents of the settlement have the burden of providing the court with sufficient background and other information about the case to enable the court to evaluate the settlement. Newberg on Class Actions § 11.42, at 11-94 to 11-95; MCL 2d § 30.44, at 241-42 ("the burden is on the proponents to show that the settlement should be approved"); accord In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 312 (N.D. Ga. 1993); Steiner v. Fruehauf Corp., 121 F.R.D. 304, 306 (E.D. Mich. 1988); Wattleton v. Ladish, 89 F.R.D. 677, 680 (E.D. Wis. 1981). Because settling plaintiffs and settling defendants in a class action are both proponents of the settlement, they are no longer adversaries with respect to the request for court approval of the settlement. Newberg on Class Actions § 11.42, at 11-94 to 11-95. In a class action the court always has the responsibility of protecting the class because of the opportunities for abuse peculiar

[50]The burden of proof in this context is not the burden of proving the merits of the parties' claims or defenses. The most important factor in final approval is a comparison between the likely results of further litigation with the likely results of the proposed settlement in order to determine the adequacy of the settlement for the class. The overall burden of proof for final approval relates to the fairness, adequacy, and reasonableness of the settlement.

[51]The United States v. Oregon, 913 F.2d 576 (9th Cir. 1990), has been cited by the State for the proposition that the burden of proof should be on opponents of a settlement. See State's Opening Pre-Hearing Mem. Sup. Final Approval, at 3 n.2 (Oct. 11, 1994), citing U.S. v. Oregon, 913 F.2d 576, 579-80 (9th Cir. 1980), cert. denied Makah Indian Tribe v. United States, 501 U.S. 1250 (1991). Counsel for Weiss and AMHA have cited In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), for the proposition that the proponents of the settlement have the burden of proving with clear and convincing evidence that the settlement is fair, adequate and reasonable. Weiss & AMHA's Response Brief, at 7 (Oct. 19, 1994). Neither side is totally correct.

to class actions. See, e.g., In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1122 (7th Cir.), cert. denied, 444 U.S. 870, 62 L.Ed.2d 95 (1979); see also MCL 2d § 30.41, at 236 (court must assure that eagerness of settling parties to avoid trial in a class action does not result in a settlement that is adverse to the interests of some or all class members). In order to assure that the interests of the class are protected, the court must independently analyze the evidence and recommendations. See Newberg on Class Actions § 11.42, at 11-95 to 11-96. Therefore the settling parties have an obligation to furnish adequate information to enable the court to independently reach its own determination of reasonableness, adequacy, and fairness whether or not opposition to the settlement exists. Newberg on Class Actions § 11.42, at 11-96.

At the final approval hearing, "counsel for the settling parties typically are called upon to make an appropriate showing on the record why the settlement should be approved." MCL 2d § 30.42, at 238. The amount of detail with which the settling parties must show why the settlement should be approved depends on the circumstances of the case, particularly opposition among the class. MCL 2d § 30.42, at 238; cf. In re Agent Orange Product Liability Litigation, 597 F.Supp. 740, 761 (E.D.N.Y. 1984) (fairness, reasonableness and adequacy must be judged in light of the "totality of circumstances"); Axinn & Sons Lumber Co. v. Long Island Railroad, 90 F.R.D. 2, 5 (E.D.N.Y. 1979) (where defendant's liability has been established, any party attempting to justify settlement amounting to only a small fraction of the possible recovery has substantial burden of proof).

If there is no evidence of collusion or other improprieties, the burden of proof is on proponents of a settlement to convince the court by a "preponderance of the evidence" that the settlement is fair, reasonable, and adequate.[52] Holden v. Burlington Northern,

[52]Irregularities in negotiations increase the burden. For example, in In re General Motors Corp. Engine Interchange Litigation, the Seventh Circuit stated that "although the proponents of any class settlement always bear the burden of proof on the issue of fairness, proponents who improperly negotiate a settlement

Inc., 665 F.Supp. 1398, 1407 & n.10 (D. Minn. 1987); accord In re General Motors Corp. Engine Interchange Litigation, 594 F.2d at 1126 n.30; Welsch v. Gardebring, 667 F.Supp. 1284, 1290 (D. Minn. 1987).

Some courts have stated that if a settlement is recommended by experienced class counsel after arm's-length bargaining during settlement negotiations, a court may presume the settlement is fair. See In re Union Carbide Corp. Securities Litig., 718 F.Supp. 1099, 1103 (S.D.N.Y. 1989);[53] see also Newberg on Class Actions § 11.42, at 11-94 to 11-95. However, the particular facts here do not support any such presumption. The present case involves strong opposition from half of the class attorneys, one of the original named plaintiffs,[54] and perhaps as much as one-third of the class.

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should bear the heavier burden of establishing fairness by clear and convincing evidence." In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979).

[53]The Sixth Circuit has indicated that after preliminary approval, a presumption of validity usually should attach to the proposed settlement and objectors then have a heavy burden to demonstrate that the settlement is not fair, reasonable, and adequate. E.g., Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). In a shareholder suit against corporation executives, a district court in Ohio stated:

> The proponents of the settlement have the burden of persuading the Court that the compromise is fair, reasonable and adequate. With the Court's preliminary approval of the stipulation, the proponents satisfy this burden and the settlement is presumptively reasonable. The burden then shifts to the objecting shareholders who have a heavy burden of demonstrating that the decree is unreasonable.

Granada Investments, Inc. v. DWG Corp., 823 F. Supp. 448, 454 (N.D. Ohio 1993)[citations omitted]; see Whitford v. First Nationwide Bank, 147 F.R.D. 135, 138-39 (W.D. Ky. 1992); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 246 (S.D. Ohio 1991); In re Dun & Bradstreet Credit Services Customer Litigation, 130 F.R.D. 366, 370 (S.D. Ohio 1990).

[54]Vern Weiss, father and next friend of Carl Weiss, a minor child when this litigation began, strongly opposes the HB 201 settlement. Final Hearing (Nov. 2, 1994).

Weiss and AMHA have urged the court to impose a burden of persuasion of "clear and convincing" evidence. The only case relied upon by Weiss and AMHA which imposed such a burden did so because of collusion or improprieties during negotiations. See In re General Motors, 594 F.2d at 1126 n.30. The court has rejected that basis here. Moreover, the court does not find any other irregularity which would argue in favor of the higher burden of proof.

The court concludes that during this final approval process, the proponents have the burden of proving by a preponderance of the evidence that HB 201 offers a fair, adequate, and reasonable settlement of this class action.

C. Extent to which Problems Identified by the Court in the Decision Regarding Preliminary Approval Have Been Resolved.

In the preliminary approval decision, the court expressed concern about the likelihood that the State's land contract portfolio could not be sold for the $25 million stated in HB 371.[55] In that event, the full $200 million would not be available for deposit in the trust fund. The amendments passed during the second special legislative session included designation of additional sources of funds if the original sources designated in HB 371 are insufficient. Ch. 2 §§ 4-5, SSSLA 1994. Therefore, the availability of the full $200 million for the trust fund is assured.

HB 201 originally included 116,000 acres of subsurface estate near Salcha in the reconstituted trust that were selected by the State but not tentatively approved by the federal government for conveyance due to a continuing military claim to the land. The legislature deleted this parcel from the list of lands to be included in the reconstituted trust in the second special session. A replacement parcel comprising 184,320 acres of subsurface estate in the same

[55]HB 371 is Ch. 6, FSSLA 1994. HB 371 appropriated money from four different sources to fund the $200 million payment. Ch. 6 § 1, FSSLA 1994.

region was added to the list of trust parcels. Ch. 1 §§ 4-7, SSSLA 1994. All parties agree that this replacement parcel is at least equal in total value to the original 116,000-acre parcel.[56] Therefore, the previous uncertainty over conveyance of approximately one-tenth of acreage of the reconstituted trust has been satisfactorily resolved.

Other corrections to the land lists referenced in HB 201 also were made. Ch. 1 §§ 4-7, SSSLA 1994. Some of the errors had been identified by opponents of the settlement and others were identified by DNR. These corrections were primarily technical in nature and did not significantly affect the value or total acreage of the settlement. However, the land lists accompanying HB 201 are now more accurate.

The legislature eliminated the problem of an appeal potentially destroying the settlement. The condition that all appeals be resolved before the December 15th deadline in order for the settlement provisions of HB 201 to become effective was eliminated in the second special session. Ch. 1 § 2, SSSLA 1994. As long as final approval and dismissal of the case in the superior court occur no later than December 15, 1994, the settlement provisions of HB 201 will become effective.

One problem which still remains is the absence of specific guidance for DNR's management of the reconstituted trust lands. Many class members distrust DNR and are adamantly opposed to management of trust lands by DNR despite the establishment of a separate unit in DNR to manage the lands. In addition, several class members expect mining and other resource development interests to exert heavy influence when DNR adopts regulations for management of trust lands. While both the developers and the trust will desire to make money from land resources, developers and the

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[56]DNR estimated the total value for the original parcel to be $97 million and the total value for the replacement parcel to be $110 million. The mineral consultants hired by proponents and opponents of the settlement both concluded that the total value for the Salcha replacement parcel exceeded the value of the first Salcha parcel. See Final Hearing, Exh. AJ (assessment prepared by Behre Dolbear & Co.) and Exh. AL (Letter from Dr. Paul Metz to David Walker and James Gottstein).

trust beneficiaries will not always have the same goals and interests in the management of these lands.

Improper management on the part of DNR is likely to lead to another lawsuit, something the State would undoubtedly like to avoid. A separate DNR unit managing trust lands will not have the conflicting objectives and policies that may have contributed to the previous failure of DNR to meet its fiduciary duties with respect to trust land. Personnel in a separate unit can be trained in trust land management. Land management decisions within the unit will pertain only to trust land. Within the unit at least, a proposal to sell a trust land parcel will not need to compete with a proposal to sell other state land.

The settlement establishes oversight of DNR management by the Trust Authority. The Trust Authority will essentially be DNR's client. It will be difficult for DNR to justify acting against the advice of the Trust Authority. The actions of the separate DNR trust lands unit are likely to be closely scrutinized by mental health advocates.

When DNR adopts regulations for the mental health trust lands unit, the public and mental health advocates will have an opportunity to comment and, if necessary, challenge the regulations. See generally AS 44.62 (Administrative Procedure Act). HB 201 requires DNR to adopt regulations that implement section 17. Ch. 5 § 17(c), FSSLA 1994. Although section 17 requires DNR to manage trust land under provisions of law applicable to other state land, this is subject to the overriding imperative of managing mental health trust land consistent with the trust principles of the Alaska Mental Health Enabling Act of 1956. Ch. 5 § 17(a)-(b), FSSLA 1994. Any DNR regulation for the separate trust unit that conflicts with the State's trustee responsibilities under the Enabling Act will violate its statutory authority and must fail because of the supremacy of the Enabling Act. Certainly during the process of adopting the first set of regulations for trust land management, the memory of this twelve-

year case will be sufficiently fresh to discourage DNR from adopting regulations adverse to the interests of the trust.

The court finds that problems previously identified as requiring legislative action have been satisfactorily resolved. Of course, the uncertainty over policies and regulations for DNR management of trust lands remains a concern.

D. Settlement Compared to Further Litigation

The most important factor in evaluating the fairness of a class settlement is a comparison between the likely result of further litigation and the remedy provided in the settlement. See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14, 67 L.Ed.2d 59, 67 n.14 (1981). The court must determine "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." MCL 2d § 30.44, at 242. In making this determination, a court must have a grasp of the facts and law involved as well as the possible range of damages the class could recover. In re Agent Orange, 597 F. Supp. at 760. The value of the settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." In re Agent Orange, 597 F. Supp. at 762. At the same time, the court must refrain from turning the settlement approval process into a trial. In re Agent Orange, 597 F. Supp. at 760.

1. The settlement

The HB 201 settlement provides the class with five primary benefits. The mental health lands trust will be reconstituted with some original trust lands and some replacement lands selected from among existing state lands. The Trust Authority is created with responsibility for protecting trust assets and planning and promoting the integrated comprehensive mental health program. The mental health program is given advantages in the budgeting process. The trust is given $200 million in cash. Although the

lands will be managed by DNR, a special unit is created whose exclusive responsibility will be to manage trust lands.

The class will lose its claims to the lands which will not be returned to trust status.[57] It is difficult to determine the value of those lands because of valuation issues. However, for discussion and comparison purposes, the parties have placed these values on the lands which are not being returned to the trust:

Table 1
Lands not returned to trust status (NRTL's)

Category	State's Value (in millions)	Plaintiffs Value (in millions)
Surface lands	443.6	$ 443.6
Mineral lands	122.7	535.4
Timber	26.4	36.5
Coal	38.6	28.9
Hydrocarbon	2.8	2.8
Total	$ 634.1	$ 1,047.2

The class will also give up any claims it may have to damages from mismanagement by the State or from a breach of trust.

The reconstituted land trust will consist of some lands which were original mental health trust lands and some substitute replacement lands. The reconstituted trust will contain a variety of lands valued for timber, coal, minerals, oil and gas, and surface uses:

[57]This statement is not true if the State materially breaches the settlement agreement. In the event of a material breach, the beneficiaries may file a new action reasserting all their claims. The beneficiaries may not be in as good a position as they are today because there may be intervening rights created which would defeat their claims. However, they will not incur any detriment from the fact they dismissed their claims with prejudice.

Timber: Approximately 58,000 acres, including original trust lands at Cape Yakataga and Jackolof Bay and substitute lands at Thorne Bay.

Coal[58]: Approximately 157,000 acres, all unleased original trust lands, located in the Matanuska Valley Moose Range, Healy and Beluga.

Minerals: Approximately 423,000 acres, including original trust lands with fee or mineral only estates in areas near Ketchikan, Juneau, Fairbanks, Healy (California Creek), and Chena Hot Springs, and substitute lands at Livengood, Cleary Summit (Ft. Knox), Ophir, Haines (mineral estate only) and Salcha (mineral estate only).

Oil & Gas: Approximately 106,000 acres, including original trust lands in the Cook Inlet region (hydrocarbon estate only) and substitute lands to replace those lost in the Cook Inlet Regional Corporation ["CIRI"] exchange adjacent to the CIRI lands.

Surface: Approximately 150,000 acres, including almost 36,000 acres in southeast Alaska, more than one-half of which is located near Ketchikan and Petersberg; approximately 52,000 acres in southcentral Alaska, over one-half of which is primarily original trust land in the Matanuska Valley, mostly in the Palmer and Wasilla area; and over 62,000 acres in interior Alaska, over half of which is located in Nenana and Anderson.

Without question, the reconstituted trust is not as valuable as the original mental health trust. Plaintiffs' most optimistic values would value the original trust lands at $1.9 billion and the reconstituted trust at $1.1 billion.[59] Plaintiffs estimate that over

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[58]None of the leased coal lands in the original trust will be returned to the trust. There was no legal impediment to their return.

[59]These numbers are both based on Chapter 66 assumptions and mineral valuation by Dr. Metz. The court believes that both are overstated values.

$900 million of the value of the reconstituted trust is from original trust lands that are being returned. See Exh. AA. Neither side places particularly large values on the substitute lands. These are the approximate values for the substitute lands estimated by the parties[60]:

Table 2
Substitute Lands

Category	State Value (in millions)	Plaintiffs' Value (in millions)
Surface	$ 101.2	$ 101.2
Mineral	182.7	161+
Timber	24.7	26
Coal	.....-	-
Hydrocarbon	2.8	2.8
Total	$ 311.4	$ 291+

A large part of the difference in value between the original trust and the reconstituted trust is in surface value ($443.6 million in non-returned trust lands versus $101.2 million in substitute lands). The trust lands which are not being returned are generally lands where the State conveyed an interest to someone else. With respect to lands chiefly valued for their surface value, this includes primarily the lands now held by municipalities and third party purchasers. These were the lands originally selected as "settlement" lands, that is, the lands near urban areas that the individuals selecting the lands for the trust expected to be sold for growth and surface development. These lands were among the most desirable for immediate sale when the legislature reclassified trust lands as general grant lands. The court considers these valuation numbers to be fairly reliable and the reduction in value to be close to a real dollar loss.

[60]The State's values are found in Exh. Z. The plaintiffs' values are the court's best estimation based on a variety of sources.

The other area of significant decrease between the original trust and the reconstituted trust is in mineral value ($535.4 million in the non-returned trust lands versus $161+ million in the reconstituted trust, using plaintiffs' figures derived from Dr. Metz' valuations). The court does not consider these valuation numbers to be reliable. The court does not believe this reduction in value is a real dollar loss.

The second benefit of the settlement is the creation of the Trust Authority. The court finds that this is a substantial benefit. Under the statute, the Trust Authority will have primary responsibility for overseeing the integrated comprehensive mental health program for Alaska and the mental health trust. The program improvements and the importance of the Trust Authority are the one thing on which all of plaintiffs' attorneys agree; these provisions were developed by interested parties in three years of work. The Trust Authority will be the trustee of the reconstituted trust. It will not manage the land or the mental health trust fund, but it will oversee the management by DNR and the Permanent Fund Corporation. The Trust Authority "has a fiduciary obligation to ensure that the assets of the trust are managed consistent with the requirements of [the Enabling Act]." HB 201 § 9 (to be codified as AS 37.14.009(a)). The Trust Authority will have the power to spend the income from the trust on the integrated comprehensive mental health program according to the intent of the parties to this agreement. See Settlement Agreement, art. V, § 4, at 12 (June 10, 1994). The Board of Trustees of the Trust Authority is to be appointed by the governor and confirmed by the legislature after consideration of a list of persons prepared by a panel composed of individuals selected by the major advocacy groups[61] for the four core beneficiary groups, the Alaska Native Health Board and the Trust Authority. Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991. The Trust Authority must "prepare, and periodically revise and amend, a plan for an

[61]The groups are: the Alaska Mental Health Board, the Governor's Council on Disabilities and Special Education, Advisory Board on Alcoholism and Drug Abuse, and the Older Alaskans Commission.

integrated comprehensive mental health program" in conjunction with the Department of Health and Social Services. Ch. 66 § 36, SLA 1991 (to be codified as AS 47.30.620(a)). It is the court's judgment that even if the reconstituted trust never earns enough money to support the mental health program, the Trust Authority and the program changes made in the statutes should provide real improvements in the lives of the beneficiaries. For this reason, the court considers the Trust Authority with all its powers and its advocacy position to be a fundamental and significant part of this settlement.

The third benefit from the settlement lies in the budgeting advantages found in the legislation. First, the Trust Authority must develop a budget for the integrated comprehensive mental health program. HB 201 § 27 (to be codified as AS 47.30.046(a). Second, if the governor's appropriations bill for funding the mental health program differs from the Trust Authority's budget, the governor must provide a report which explains the reasons for the differences. HB 201 § 5 (to be codified as AS 37.14.003(b)). Third, if an appropriation is vetoed, the governor must explain the veto in light of the Trust Authority's recommendations. HB 201 § 6 (to be codified as AS 37.14.003(c)). Fourth, appropriations for the mental health program must be made in a separate bill limited only to those appropriations. HB 201 § 7 (to be codified as AS 37.14.005(b)). Fifth, the legislature must issue a report explaining any differences between the Trust Authority's recommended general fund budget and the appropriation bill passed. Id. at AS 37.14.005(c).

These budgeting advantages may prove to be significant as the budget for the integrated comprehensive mental health program competes with other needs for general fund appropriations. The mental health budget is given an advantage for inclusion in the governor's budget over the budgets of other state agencies. The mental health budget is given an advantage before the legislature both from its separation from other appropriations and in the required legislative report. Clearly, there are no guarantees of

adequate funding or expanded funding for necessary services, but these budget advantages may prove to be significant nonetheless.

The fourth benefit from the settlement is the payment of $200 million to the trust fund. This cash infusion is extremely significant. First, it ensures that there will be some income for the support of the Trust Authority and whatever programs it decides to fund. Second, it is real money in hand today. In this way it is unlike the other values that are attached to the trust assets. For example, $200 million of mineral value may never produce $1 of income for the trust, because the mineral values are based on probabilities of discovery derived from extremely limited geophysical, geochemical, and geological data with no actual drilling. The results of comparing the $200 million in cash with a royalty stream are interesting. The $200 million is the equivalent of the net present value of an annual royalty stream of $254 million paid with a 10 year start-up delay and a 20% discount rate over the 20 year average life of a mine. It would take $6.3 billion in metallic mineral production each year from these lands to generate that royalty stream.[62] The $200 million is also more valuable than $200 million value in surface estate lands. To compare those two values one must apply an absorption rate and a discount rate to the surface value. Doing so could reduce the surface values to as much as one-tenth to one-fifth of their stated value, thus $200 million surface value in lands may be the equivalent of $20 - 40 million cash in hand.

The fifth benefit of the settlement is the creation of a special unit in DNR whose sole job will be to manage the reconstituted trust lands.[63] The court considers the addition of a

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[62]This example uses a 4% net smelter return royalty. The entire annual metallic mineral production of the United States is $11 billion. If you assume no time delay and use a 10% discount rate, the necessary annual royalty payment would be $23.5 million.

[63]Although listed as a settlement benefit, this provision of HB 201 remains effective even if the settlement fails. See HB 201 §§ 17, 18, 22, and 52. It is listed as a settlement benefit because it may not be achieved through litigation, if the non-settlement provisions of HB 201 are held invalid.

special unit to manage these lands to be an improvement over general management by DNR for several reasons. First, the land managers in the special unit will have a smaller amount of land per person to manage than those in DNR. This should allow managers to be proactive managers instead of passive managers. Second, the special unit members can be trained in the special rules applicable to trust management and will have to apply only those rules and those laws applicable to other state lands which do not conflict with trust management under the Enabling Act. Third, the individuals in the special unit may develop a sense of pride in their special charge.[64]

There are two advantages to settlement not found in the statutes. First, the involvement of the environmental and resource industry interest groups in the negotiation process should assist the trust's development of its lands for income purposes. Where people are involved in the development of a settlement, they are less likely to attack it.[65] Additionally, there should be fewer challenges to the trust's attempts to develop the land because of the agreement of affected parties to the inclusion of the lands in the reconstituted trust. Second, settlement is advantageous because it eliminates the delay that would result from litigation and the cost of further litigation. This case would take years to try, even with the concerted efforts of all participants.[66] The court would have to determine individually whether over 5,000 third party purchasers were bona fide purchasers. The court would have to adjudicate claims to lands given to municipalities, placed in legislatively designated areas, used by state agencies and exchanged for other

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[64]Mr. Erickson described disadvantages he expected from the way in which the special unit is set up with all employees in the "partially exempt" classification. The court disagrees with Mr. Erickson and expects more good than bad to result from the creation of the special unit.

[65]The Chapter 66 experience taught all this lesson. Chapter 66 was attacked by both the public interest and oil company intervenors. Those attacks delayed implementation of and weakened the Chapter 66 settlement.

[66]This is not true if the non-settlement provisions of HB 201 are valid. However, in that case, the appeal from this court's decision could take several years.

lands. The court would have to litigate the extent of the setoff for state expenditures, examining hundreds of appropriations and grants. The court would have to litigate the plaintiffs' claim for lost opportunity damages due to mismanagement of the trust. The delay would be years and the cost to the state would easily be in the millions of dollars. Merely avoiding delay is never a sufficient reason to approve a settlement; it is essential not to "substitute one hour of efficiency for one moment of justice." Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1223 (5th Cir. 1978), cert. denied, 439 U.S. 1115, 59 L.Ed.2d 74 (1979). However, delay in this case is costly for the trust. Every year of litigation is time wasted for the development of trust assets so that they can produce income for the beneficiaries' interest.

2. Litigation

The actual results of litigation are impossible to predict and it would not be proper for the court to actually rule on contested issues. However, it is necessary to analyze the litigation risks present. That is, the court must analyze the strengths and weaknesses of the plaintiffs' case. If plaintiffs won on every issue, the result would be the reconstitution of the trust with all of the original mental health trust lands. The State would either not be able to apply a setoff for state expenditures on the mental health program or the setoff would be neutralized by plaintiffs' claims based on mismanagement of the trust. The trust lands would be managed by DNR, unless the plaintiffs succeeded in removing the State as trustee.[67] There would be no Trust Authority and no program improvements. If the plaintiffs were extremely successful, there might be some cash for the trust from their lost opportunity claims based on mismanagement of the trust. This "best-case" scenario is not very likely. There are significant litigation risks from (a) the non-settlement provisions of HB 201, (b) the determination that some lands are "sold", (c) the application of the setoff for state expenditure on the mental health program, (d) the difficulties of proof of the lost opportunity claim, and (e)

[67]The court does not believe this is very likely.

problems with the valuation of mineral lands. The court will discuss each of these risks.

a. Non-settlement provisions of HB 201

If this case is not dismissed by December 15, 1994, the portions of HB 201 that will be effective would accomplish a legislative reconstitution of the trust with the same lands included in the settlement. The Trust Authority, program improvements, and budget advantages would not be enacted. The $200 million would not be appropriated to the trust. Obviously, if HB 201 is valid, the class is much better off with this settlement.

The State defends the non-settlement provisions of HB 201 under the doctrine of "curative legislation." Weiss and AMHA argue that the statute does not meet the test for curative legislation.

The Alaska Supreme Court has adopted this definition of a curative statute:

> a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which, in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.

Fairbanks North Star Borough v. State, 753 P.2d 1158, 1160 (Alaska 1988), quoting 2 C. Sands, Sutherland Statutory Construction § 41.11 (4th ed. 1973). Legislation must meet a two-pronged test in order to be considered curative of previously enacted invalid legislation:

> (1) the legislature originally must have had the power to authorize the acts done, and

(2) there is no unconstitutional impairment of vested rights as a result of the act's passage.

Fairbanks North Star Borough v. State, 753 P.2d at 1160. If a statute qualifies as a valid curative statute, it is given retroactive effect. Fairbanks North Star Borough v. State, 753 P.2d at 1160. Therefore, actions rendered void prior to passage of the curative statute are legitimized. Id.

It is fairly likely that the State could show that the legislature would have had the power to enact the non-settlement provisions of HB 201 at the time of the 1978 redesignation legislation. It is clear from State v. Weiss, 706 P.2d at 683-84 that the legislature did not have the power to terminate this trust. However, HB 201 does not terminate the trust; it exchanges some substitute land for trust land and "sells" some land for the benefit of the mental health program, and it applies the setoff for money spent on the mental health program to the proceeds of the sale. The Alaska Supreme Court permitted the State to dispose of land from the university lands trust, as long as the university lands trust was compensated for the appraised value of the disposed land. State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981). However, that case involved the redesignation of 5,040 acres of university trust land of a total 100,000 acre trust for park designation. The difference between University of Alaska and this case was primarily one of degree. The court in Weiss stated:

> Unlike the situation in University of Alaska, the present case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the trust is intermingled with the general grant lands of the state. No particular use of the trust lands is specified and it may be years before much of the land is used. While it was reasonable to infer a legislative intent to pay for 5,040 acres for which there was a present park land use in University of Alaska, it is not reasonable to infer that the

> legislature meant to pay for a quantity of trust land approaching one million acres for which in large part there is no present use. Thus, the payment remedy imposed in University of Alaska is not appropriate here. Because the state in passing the redesignation act went beyond the power which had been granted it with respect to the trust lands by Congress, the redesignation act must be declared invalid.

State v. Weiss, 706 P.2d at 684. Under the Enabling Act, the State was given the power to exchange and sell trust lands for the benefit of the beneficiaries. Section 202(e) of the Enabling Act provides, in part:

> Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska.

The court concludes that the State would have greater difficulty establishing the second prong. Nevertheless there is a significant litigation risk associated with the non-settlement provisions of HB 201.

b. "Sold" lands

Under the Supreme Court's guidance in Weiss, the State must reimburse the trust for the fair market value of lands "sold" after the 1978 redesignation legislation. Weiss, 706 P.2d at 684. However, the State is allowed a setoff for "mental health expenditures" from the date of the redesignation legislation to the date of the "sale." Id. If expenditures exceed the fair market value of the lands sold, the State need not furnish cash as part of the reconstitution. Id. Thus, it is in the interests of the class to

exclude lands from the category of "sold" lands, and it is in the interest of the State to include lands within the "sold" category.

The Supreme Court expressly did not reach the issue which AMHA attempted to raise on appeal, viz. whether lands could be returned to the trust if the purchaser was not a bona fide purchaser. Weiss, 706 P.2d at 684 n.4.

There are several categories of land at risk of loss to the trust without compensation: pre-1978 disposals, land held by third party purchasers, municipality entitlements, classification to legislatively designated areas (LDA's), lands used by other state agencies, and lands exchanged with the Cook Inlet regional corporation ["CIRI"]. The leased coal lands at Healy and Beluga are not in these classes. If the case was litigated, those leased coal lands would clearly return to the trust.[68]

The court concludes that the litigation risk associated with the pre-redesignation legislation disposals is very high. Nothing in Weiss would require that they be included in the reconstituted trust. To mandate their return, the plaintiffs would have to prove a breach of trust or other invalidity other than the enactment of the redesignation legislation. It is not likely that the plaintiffs could do so, in light of the power of the legislature to sell the trust lands and the court's decision in University of Alaska.

These pre-1978 disposals encompass a significant amount of land and land value. Before the redesignation legislation, the State had disposed of 19,590 acres of original trust land in sales to individuals and 164,386 acres of original trust land to LDA's. Exh. 12, at 2b. The Chena Recreation Area outside Fairbanks was the recipient of much of the acreage lost to LDA's. The plaintiffs' estimate that as much as one-eighth of the value of the original trust lands, $237.5 million, is in the Chena Recreation Area.

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[68]The loss of these coal lands is significant. They are the only coal lands currently in production. They generate approximately $1 million per year in royalties.

The second category of land which may be lost is that sold to third party purchasers. It would be difficult for the plaintiffs to argue that the land was not "sold." The question would be whether the bona fide purchaser doctrine applied, and if so, whether the plaintiffs could obtain the land from purchasers because they were not bona fide purchasers. The plaintiffs' claim that the bona fide purchaser doctrine should be applied is a strong one. It is a doctrine normally applied to property purchased where the trustee breached the trust by selling trust property. See Restatement (Second) Trusts § 284 (1959). Weiss implies that basic trust principles should be applied to this trust. See State v. Weiss, 706 P.2d at 683 and n.3. However, the litigation risk associated with recovering this property is very high because most of the purchasers probably were bona fide purchasers. The trust would only recover the property if the purchaser bought the property with knowledge of the breach of trust.[69] It is likely that most purchasers before 1985 did not know that the State had breached its fiduciary obligations to the trust. Few people even knew there was a mental health lands trust before this litigation was filed in 1982. The third party purchasers may have other defenses as well such as the statute of limitations, waiver, and the lis pendens expungement before the appeal.

The value associated with land conveyed to third party purchasers is significant. Ms. Hayes stated that the plaintiffs valued these lands at $154.6 million. The chance of recovering any significant portion of those lands is low.

The third category which may be lost is land that was conveyed to municipalities as part of the municipal entitlement program.[70] Plaintiffs claim that this land was not really sold, it was

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[69]Sometimes property can be recovered from those who should have known of the breach of trust. See Restatement (Second) Trusts § 297 (1959). Plaintiffs have also asserted that if the sale was for less than fair market value, the trust should recover the land. This basis for recovery is more tenuous in light of the history of state sales at less than fair market values.

[70]Each municipality was allowed to select a specified number of acres of state land within its boundaries. See AS 29.65. Municipalities were permitted to select

given away with no expectation of payment. The State argues that it was sold just as the lands designated for Chugach State Park were sold in University of Alaska. Even if the plaintiffs prevail on whether the land was sold, they face a major obstacle in obtaining the lands since many of the lands have been sold by the municipalities to individuals, some of whom are likely to be bona fide purchasers.

The court assesses the litigation risk for the municipal conveyance as medium. The value was given by Ms. Hayes as $188.1 million.

The fourth category of land which may be lost is the LDA land, that is, land which has been set aside by the legislature for other uses such as parks. The plaintiffs claim that the land was not sold. The State asserts its right to designate the trust land as recognized in University of Alaska.

The litigation risk associated with these lands is high in light of University of Alaska. The mineral value of these lands determined by Dr. Metz was $534.9 million.[71] See Exh. V, at 23 (Table 3).

The fifth category of land which may be lost is the land used by other state agencies. The plaintiffs argue the land has not been sold. The State probably argues that the trust land is like condemned land.

The court assesses the litigation risk as high. The value of the land has been estimated at $15 million.

The sixth category of land which may be lost is the land which was exchanged with CIRI. This exchange was approved by

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mental health trust land until the October 4, 1985. AS 29.65.060. On October 4, 1985 the Alaska Supreme Court issued the Weiss decision.

[71]This figure includes the Chena Recreation Area, discussed above. Excluding that area, the value is around $300 million.

legislation in the United States Congress. Accordingly, it could be appropriate to regard the land as taken away by Congress and thus lost. The plaintiffs argue that the trust should receive the land that was exchanged for this land.[72] The State may argue that Congress did not intend for the exchanged lands to be included in the trust since the conveyance did not specifically mention the mental health trust.

The court considers the litigation risk associated with the exchanged lands to be fairly low and the risk associated with return of the original lands to be extremely high. The plaintiffs have valued the CIRI lands at $45.5 million.

There are significant litigation risks associated with several categories of land. The amounts at risk, as estimated by the plaintiffs, is shown below.

Table 3
Litigation Risks

Land Category	Litigation Risk	Value (in millions)
Pre-1978 lands	Very high	$237.5+
Third party purchasers	Very high	154.6
Municipal conveyances	Medium	188.1
LDA's	High	300
State agencies	High	15
CIRI (exchanged lands)	Low	45.5
	Total	$940.7

c. Setoff

The setoff for state expenditures for the mental health program presents a very significant litigation risk. The setoff has

[72]Weiss provided that where exchanges are made, "the properties which can be traced to an exchange" will be included in the trust. Weiss, 706 P.2d at 684.

the potential to negate any cash recovery to the trust resulting from the State's obligation to pay for "sold" lands.

The plaintiffs disagree that the State should be able to apply a setoff in this way and assert that the Supreme Court's statement in Weiss was the result of mismanagement by then-class counsel.

The litigation risk associated with winning this claim at trial is very high. First, the Alaska Supreme Court has already stated that the setoff is to be applied. Second, it is very unlikely that the ruling would be reviewed by the United States Supreme Court. Third, there are sound arguments that favor the setoff. Section 202(e) of the Enabling Act appears to allow the proceeds of sales to be used for the necessary expenses of the mental health program.

If the setoff is applied, its impact would likely be substantial. The court has no evidence of the size of the setoff. The legislature found that "state mental health expenditures have totaled more than $1,300,000,000" since 1978. HB 201 § 1(18). Even if this sum is reduced because of overinclusion of expenses and overinclusion of years,[73] it has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been "sold."

d. Lost opportunity claim

Weiss and AMHA maintain that the plaintiffs' claim for lost opportunity damages due to the State's mismanagement of the trust would more than nullify the setoff for state expenditures. There has been no discovery done on this issue. There has been no attempt to litigate the issue. This claim has largely been relegated to an occasional whisper from the back of the courtroom; this claim

[73]The Supreme Court's guidance appears to limit the setoff to amounts spent from 1978 to the date of the "sales." That would limit expenditures to the period from 1978-85 for most "sold" lands.

has never played a central role in anyone's analysis of the case until the hearing on final approval.[74]

There are significant risks associated with the lost opportunity claim. The court believes that it is very likely that the plaintiffs could prove that the State mismanaged the trust. The State did not treat these lands differently from other state lands even before the redesignation legislation. DNR did not manage the lands proactively to produce income for the trust. The State did not even maintain separate accounting for trust revenues. The difficulties with the claim stem from the difficulty of proving damages and the potential for the assertion of legal defenses.

Lost opportunity damages are difficult to prove in the any case unless there is an existing history of business activity or earnings. They would be extremely difficult to prove in this case.

The most difficult area of proof concerns the mineral lands. Almost nothing is actually known about the mineral producing capacities of these lands. The lands were open for mineral development and staking for free from the time they were in state control until after the Supreme Court's decision in Weiss. Accordingly, the proof would center on what would have happened with proactive promotion of the lands. However, there is no appropriate comparative standard. Throughout this period no group in this state actively promoted mineral lands. Thus, it is hard to predict how the mineral industry would have reacted to active management. Even if the plaintiffs overcome this hurdle, they would have to prove how much money they would have earned from producing mines. Alaska has not had a very active

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[74]For example, the proponents of the Chapter 66 settlement agreement had only this to say about this claim in their informational booklet for the class:

> The Plaintiffs also argue that before taking the setoff the court should consider what the trust should have earned if it had been properly managed. Even if Plaintiffs were able to establish the principle, it would be very difficult to prove what should have been earned.

Preliminary Report on Proposed Settlement of the Mental Health Trust Lands Litigation (Chapter 66 SLA 1991), at 42 (1991).

metallic mineral industry, other than for the production of gold. There is a substantial risk that the plaintiffs would be left with speculative damages for which they could be awarded nothing.

The easiest area to prove, lost opportunity damages concerning the surface lands, still poses litigation risks. There are proof problems there as well. The years from 1966 (when selections were largely completed) to 1978 were growth years for the state, but most of the growth occurred in the latter part of that period with the building of the Transalaska pipeline. The plaintiffs could have difficulty showing a market for lands before 1975. The plaintiffs could also have difficulty from absorption rate[75] analysis.

The claims are also subject to legal defenses. The State could probably defeat some of these claims by the statute of limitations. The State could probably defeat most claims after 1986 based on waiver.[76] The State could also assert that any claims in excess of the setoff are barred by the lateness of the assertion of the claims and the limitations placed by the court on the intervention by AMHA.[77] The potential defenses put some if not all of the potential damages from the lost opportunity claim at risk.

e. Valuation issues

The bulk of the values given by the plaintiffs is derived from mineral lands. The $2.2 billion value for original trust lands derived from procedures approved by the Interim Mental Health Trust Commission contained a $1.5 billion component for

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[75]The absorption rate is the amount of time it takes the market to absorb a portfolio of property offered at one time.

[76]Around 1986 or 1987, the Interim Mental Health Trust Commission functioned as substitute trustee for the lands. Many of the transactions involving the lands were agreed to or not objected to by plaintiffs. Since 1990, at the plaintiffs urging, there has been a preliminary injunction precluding the State from taking or permitting any activity on the original trust lands without court approval.

[77]The lost opportunity claims were not asserted in the original complaint in this case. They were added in 1986 when AMHA filed its complaint in intervention. The court limited AMHA to issues affecting the reconstitution of the trust. An independent claim for damages may exceed that limitation.

mineralized lands. The $1.9 billion value attributed to the original trust lands under the Chapter 66 process contained a $1.3 billion component for mineralized lands. The $1.0 billion value by plaintiffs for the original lands not returned to the trust under this settlement contains a $535 million value for mineralized lands. In litigation, the plaintiffs would have to prove the value of lands deemed "sold" to be able to recover any damages. There are very significant litigation risks associated with proving the numbers stated. In fact, after extensive evidence on the issue at the final approval hearing, the court believes that the plaintiffs' valuations significantly overstate the value of the mineralized lands.

The plaintiffs' values for the mineralized land derive from valuations reached by Dr. Paul Metz in reports completed in 1988 and 1994. The two valuations are based on the same methodology and assumptions. In the 1994 report, Dr. Metz performed additional work by forming mining models to demonstrate economic viability of his posited mineral deposits and he changed the purchase price of the ore in conformity with historical market prices.

It is necessary to conduct extensive drilling on site to know whether land actually contains economically minable mineral deposits. Even with such drilling, the risks associated with metallic mineral development are such that mines developed with billion dollar investments turn out not to be profitable and are abandoned.

There is virtually no actual drilling information on the original mental health lands. As a result, Dr. Metz performed a probabalistic estimate of expected value.[78] Dr. Metz relied on a report prepared by the Alaska Division of Geological and Geophysical Survey ["ADGGS"] regarding original trust lands. ADGGS examined the known literature about the area of mental health trust lands by 1:250,000 scale quadrangle. They rated areas on a scale of one to five for low to high potential for the existence

[78]This methodology is an accepted method to derive the expected value of unknown and unexplored reserves.

of a mineral deposit. They identified 21 mineral deposit models expected to occur in the trust lands.

Dr. Metz also relied on the United States Geological Survey ["USGS"] appraisal of Alaska mineral resources prepared for consideration of the Alaska National Interest Lands Conservation Act. These "Open-File Reports" also involved several USGS experts reviewing the literature and estimating the number of mineral occurrences in the area at the 10th, 50th and 90th percentile levels of confidence.

Dr. Metz developed geological models based on the models of Cox and Singer[79] to replace the ADGGS models. In doing so he chose the 90th percentile tonnage and 90th percentile grade from the tonnage and grade curves provided by Cox and Singer.

None of this information allows one to predict the probability of occurrence. To develop probabilities Dr. Metz relied on three more studies: Charles River Associates, Koulomzine and Dagenais, and Bailey. From this information he assigned probabilities of discovery that on a per acre basis range from one acre in one million acres (1 in $1x10^6$) to one in 30 million acres (1 in $3x10^5$).

In the 1988 report, Dr. Metz developed his estimates of the net present value of an expected royalty stream from those calculations. He used a 4% net smelter return royalty[80] ["4% NSR"]. He assumed a 10% discount rate. He made several assumptions, including that the expected mine life for all models was twenty years, that the beneficial products in the ore would almost cover all smelting costs, and that the value should be

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[79]Cox and Singer are the authors of Mineral Deposit Models, a USGS Survey Bulletin.

[80]Current state leases call for a 3% net proceeds income royalty rate which is smaller than a 4% NSR.

calculated as if the mines were producing today, i.e., no delay for discovery, exploration or start-up.

The court heard several attacks on Dr. Metz's methodology and assumptions at the final approval hearing. The State presented testimony from Samuel Smith, the chief of the mine permitting section of DNR. H.L. presented testimony from three experts working with the firm of Behre Dohlbear & Company, Inc., mineral industry consultants located in Denver: Bernard Guarnera, the president and chief operating officer, Thomas Houseman, a financial expert, and Robert Cameron, a geostatistician.

Mr. Smith analyzed Dr. Metz' 1988 report. He took issue with several aspects of the report. Mr. Smith criticized the report on five points: the NSR values, the tonnage ore reserve, the mine life and commodity prices, and the time to discover and develop a mine. Correcting for the first four areas of disagreement reduced Dr. Metz' 1988 value for the mineral lands not being returned to trust status from $622 million to $129.5 million.[81] Applying a five-year delay in receiving revenues and a 10% discount rate reduces the value to $80 - $90 million.

Mr. Guarnera testified that Behre Dohlbear identified four basic problems with Dr. Metz' 1994 report: (1) stacking of deposits,[82] (2) disregard of costs for smelting, refining, and treatment,[83] (3) disregard of the necessary development time once a

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[81]Dr. Metz' 1994 value for mineralized NRTL's is $535.4 million.

[82]Where there was a possibility a parcel could contain more than one mineral deposit model, Dr. Metz added each one to obtain the expected value of the parcel. Behre Dohlbear opined that some of the deposits could not appear together for geological reasons; Dr. Metz disagreed. Behre Dohlbear also recommended using only the most likely model or assigning a pro rata value.

[83]Dr. Metz used 1% of the gross revenue as the smelting costs despite wide variability in such costs based on the type of ore. Dr. Metz defended his actions by relying on an assumption that the non-accounted-for minerals produced would pay for the increased smelting charges.

deposit is found,[84] and (4) the use of an improper discount rate. According to Mr. Guarnera, the mineral value of the original mental health lands would be reduced from $1.3 billion to $522 million if the stacking problem were corrected; that number would be reduced to $441 million if the proper smelting charges were used; that number would be reduced to $170 million if a 10-year development time was used. Applying the correction for stacking to the NRTL's yields a revised value of $245 million; that number is reduced to $94 million if a 10-year development time is used.

Mr. Guarnera opined that Dr. Metz' values were unrealistic. The models posited by Dr. Metz would yield more zinc, lead and silver on these one million acres than is produced in the entire United States.[85] The valuation, if true, would require $4.4 billion of annual metallic mineral production from these lands. The entire United States has $11 billion in annual metallic mineral production. There was $277 million in metallic mineral production in all of Alaska in 1989. If the predictions of the report were realized, 17 world class deposits would be located and mined on these lands.[86]

Thomas Houseman testified that Dr. Metz' use of a 10% discount rate is unrealistic based on industry experience with hurdle rates. He testified that a 10% discount rate would not be used even at a final feasibility stage after extensive drilling and exploration work. He stated that applying a 20% discount rate to the $1.3 billion value for original trust lands without any other adjustments would decrease the value to $738 million. If a 10-year

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[84]Behre Dohlbear pointed out that mines are made not found. They recommended a 10-year development time as realistic.

[85]The projections would yield three times current United States zinc production, 1.5 times current lead production, and 1.3 times current silver production.

[86]Dr. Metz defends his analysis by pointing out that our knowledge of plate tectonics would predict very large concentrations of metallic minerals in Alaska. He also points to the known world class deposits in Alaska associated with the Red Dog mine, the Alaska Juneau gold mine, the Quartz Hill molybdenum deposit, the placer gold deposits in Fairbanks and Nome, and the Kennicott copper mine near McCarthy.

development period was added, the value would be further reduced to $119 million. He opined that "expected value" is not real value and reliance on expected value can lead to unrealistic expectations.

Robert Cameron criticized two aspects of Dr. Metz' methodology. First, he disagreed with Dr. Metz' assessment and assumption that the Charles River Associates study presents expectations for the discovery of world class deposits. According to Mr. Cameron the study's expectations are of mineral occurrence of no size, quality or quantity. The expected value list used by Dr. Metz is roughly equivalent to grade/tonnage of the 50% percentile, not the 90th percentile. However, Dr. Metz used the data to predict deposits in the upper 10% of both grade and tonnage. Second, Mr. Cameron opined that Dr. Metz' stacking of mineral deposits increased the possibility of any one of the mineral occurrences occurring on a particular parcel. The net result of these errors is to overstate the probability that the posited mineral deposit will be found on trust lands.

These criticisms of the valuation of mineralized lands made sense to the court. There is very high litigation risk associated with proving a value for the mineralized lands deemed "sold" anywhere close to that contained in the report. The court concludes that the mineral values derived by Dr. Metz overstate the true value of the mineral lands. The risk is that trial would result in a finding of gross overstatement.

The unreliability of the valuation when compared to real value is an important consideration in evaluating this settlement in another respect as well. Some class members have been outraged that the trust is not being made whole, which they define as $2.2 or $1.9 billion of value. The court is confident that those are not real or reliable numbers. It is unlikely that the original trust lands could ever produce revenues approaching those that have been predicted. More importantly, given the lack of real knowledge about the lands that exists today, the number does not represent the fair market value of the lands. The valuations given by Dr. Metz are useful when comparing two groups of mineralized land, but they

do not compare with real money or with more reliable estimates of value.

3. Comparison of the likely results of litigation with settlement.

One approach for comparing the likely results of litigation with the settlement is to look at comparisons of value for the most likely results from litigation with the settlement. It is essential in making this comparison that the same assumptions for value are used throughout, accordingly, the court will use plaintiffs' values derived under Chapter 66 procedures. The value of the original trust lands under these assumptions is $1.9 billion; the value of the reconstituted trust lands is $1.1 billion.

If the case went to trial, it is not likely that all lands would be returned to the trust. The probable results range from a low value where the plaintiffs only succeeded in returning the municipal conveyances and the CIRI exchange lands and unencumbered lands to an optimistic value where plaintiffs were highly successful and lost only the pre-1978 land conveyances and 80% of the third party purchases. The low value of the reconstituted trust lands would be:

MRTL's (returned original lands)	$929 million (see Exh. AA)
Plus: CIRI exchange	45.5
Municipal conveyances	188.1
	$1,162.6 million

The high value of the reconstituted trust lands would be:

Total original trust lands	$1,900 million
Minus: Pre-1978 conveyances	237.5
80% Third party purchasers	123.7
Total	$1,538.8 million

It is the court's judgment that it is not likely that the trust would receive any cash component at litigation because the permitted setoff for state expenditures would exceed the value of

"sold" lands, even when tempered by plaintiffs' lost opportunity claim. Accordingly, plaintiffs' entire benefit from litigation would be a reconstituted trust worth between $1.2 billion and $1.5 billion. There would be no Trust Authority, no program improvements, and no budget advantages.

The settlement would yield $1.1 billion in reconstituted lands, $200 million in cash, the Trust Authority, program improvements, and budget advantages. When viewed in this light the settlement appears fair, adequate, and reasonable.

Another approach to comparing the results of the litigation with the settlement is to compare the value of the non-returned trust lands (NRTL's) with the substitute lands, the cash, and the other benefits. This approach deletes the original trust lands that are being returned from both sides of the equation. The parties' values for the NRTL's is given in Table 1 at page 62 and for the substitute lands in Table 2 at page 64. The following chart illustrates the difference in value between the NRTL's and the substitute lands ["PSL's"]:

Table 4
Difference NRTL's - PSL's

	State Values (in millions)	Plaintiffs Values (in millions)
Surface	$342.4	$342.4
Minerals	<60>	374.4
Timber	1.7	10.5
Coal	38.6	28.9
Hydrocarbon	0	0
Total	$322.7 million	$756.2 million

According to believable testimony at the final approval hearing, the $200 million in cash is the equivalent of the $340+ million in lost surface value when considering a ten-year absorption rate for the property, a 5% appreciation rate, and a 16% discount

rate. Thus, the difference between the non-returned trust lands and the settlement is primarily the loss of the Healy and Beluga leased coal lands and an uncertain amount of mineral value. The court considers this to be a reasonable and adequate trade considering the uncertainty and likely overstatement of the mineral valuation, the importance of the litigation risks, the value of the Trust Authority and program improvements, and the budget advantages from the settlement.[87]

A third approach to comparing the results of litigation with the settlement is to compare the two if the non-settlement provisions of HB 201 are valid. In this situation the comparison is clear: the class is better off with the settlement. If the non-settlement provisions of HB 201 are valid, the result of further litigation is certain. The trust would be reconstituted with exactly the same lands as those in the settlement. The trust would be managed by DNR. The class would not receive the other benefits of the settlement: $200 million, the Trust Authority, the program improvements and the budget advantages.

In summary, regardless of the approach used, the court concludes that when comparing the likely result of litigation with the settlement, the settlement is fair, adequate and reasonable.

Settlement is usually preferable to lengthy and expensive litigation with uncertain results. Newberg on Class Actions, § 11.50, at 11-122. Although liability of the State has been established in this case, much uncertainty remains with regard to the amount and type of relief. Land valuation has been a major point of disagreement between the parties since settlement discussions began. An additional parade of experts testifying about the mineral values and other land resource values will add more to

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[87]The court has difficulty calling the exclusion of the Healy and Beluga leased coal lands "fair." There was no legal impediment to their return. If the legislature reclassified them outside the settlement it would probably constitute a breach of trust. Approval of this settlement would have been a more satisfying result if those lands had been included in the reconstituted trust.

the cost of litigation than to the useful information on which to base the reconstitution of the trust.

The outcome of litigation of third party titles is far from certain. Such litigation is likely to involve the complication of defendant classes composed of the holders of third party titles. This would add greatly to the expense, duration, and complexity of this litigation and directly involve a large number of holders of small parcels. At the same time there would be little or no benefit for the class, when compared to the present settlement proposal, because of the setoff for the State's past mental health expenditures.

The court concludes that the added cost in time and money of further litigation in this case cannot be justified by the probable outcome of litigation. The plaintiffs suffer from delay because they are prevented from benefitting from the program improvements and the trust lands lie idle. There is benefit to putting this litigation to rest with a reasonable, though not ideal, settlement.

E. Reaction of the Class to the Settlement

Generally, if some class members or their counsel raise cogent objections, a court must be concerned that the case may have been settled with too little regard for the interests of the class as a whole. MCL 2d § 30.41, at 237. Substantial objections to a proposed settlement require a detailed response from the proponents. MCL 2d § 30.42, at 238. At the same time, a lack of objections or comments from the class is not always an indication of fairness. In complex cases such as this one, "when the majority of absent class members are usually unrepresented by counsel and possess insufficient knowledge to evaluate the fairness of the settlement," a court should not make an inference of fairness based on silence or a low number of objections from class members. Newberg on Class Actions § 11.48, at 11-117. A court always has a responsibility to analyze the settlement independently and intelligently and comments from the class are one factor in that analysis. Id. In addition, this court has a greater responsibility here than in most cases, due to the unsophisticated nature of most class

members. Although relatively few class members commented on the settlement, the court does not presume that all of those not commenting support the settlement. In fact, it is reasonable to assume that the same ratio of supporters and objectors exists among the silent class members and families as exists among those who submitted comments to the court.

Comments from a (b)(2) class are intended to alert the court to problems in the settlement such as potential conflicts between portions of the class. Comments from a class such as this one should not be treated as votes, although tabulation of the number of class members expressing particular opinions can be useful to the court in recognizing trends in evaluation of the settlement by class members.

Often the opinions of the named representatives of the class are of particular value to a court because the named representatives usually have a greater involvement in the case than other class members. In this particular case, the families of class members and other class advocates appear to have been at least as involved as the named representatives. One family member, Vern Weiss, is named in this case because his son, Carl Weiss, was a minor when he was named one of the original representative of the class. Mr. Weiss strongly opposes the settlement.[88] Final Hearing (Nov. 2, 1994). John Malone, a family member who has been closely involved with this case for several years supports the settlement, primarily because he believes the Trust Authority could be an effective advocate for beneficiaries. Final Hearing (Nov. 2, 1994). Other named representatives typically aligned with the viewpoint of the attorney who represents them.

1. Written comments

A post office box was rented by the court for the receipt of class comments. Individuals from the Department of Law in

[88]Earl Hilliker, another original named class member, sent a written comment opposing the settlement, but his oral comments left the court uncertain about his opinion of the settlement. Final Hearing (Nov. 2, 1994).

Fairbanks monitored the box and stamped each comment with the date received. Each comment was given a sequential number and copies were sent to class counsel at least once per week. The original comments were transferred daily to the court.

Approximately eleven hundred (1,088) written comments were received from a variety of locations in Alaska, including Barrow, Homer, Ketchikan, Anchorage, Fairbanks, and Juneau. Nearly four hundred comments were from class members, family members of class members, beneficiary advocacy groups, or guardians of class members.[89] Over 150 of these were from class members. Approximately 80 were received from mental health advocacy groups[90] or people indicating they work in the mental health field.

Because many members of the class may not be able to understand the notice or speak for themselves, comments from family members, guardians, advocacy groups, mental health professionals, and others working directly with trust beneficiaries were all considered together as comments from the class. Therefore, approximately forty percent of all written comments received were considered class comments.

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[89]The court included among beneficiaries/class members the few commentators who described themselves as suffering from a mental illness or chronic alcoholism even though on the form they marked the box for "member of the public." A similar approach was taken for all other categories of commentators because some clearly did not understand the categories.

[90]Organizations, boards, and commissions which submitted written comments in favor of settlement approval included the Alaska Addiction Rehabilitation Services (named party), Alaska Alliance for the Mentally Ill, Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, the Juneau Alliance for the Mentally Ill, the Ketchikan Alliance for the Mentally Ill, and the Older Alaskans Commission. The Alzheimer's Association recommended approval, but had several specific reservations about the settlement. The organizations submitting written comments in opposition to the settlement included the Alaska Mental Health Association (named party), the Anchorage Alliance for the Mentally Ill, the Fairbanks Alliance for the Mentally Ill, the Kenai Alliance for the Mentally Ill, and the Mental Health Consumers of Alaska.

A total of 47 purchasers of original trust land sent comments to the court. A few purchasers of trust land marked "beneficiary" on the comment form, but were clearly concerned exclusively with obtaining clear title or monetary compensation for problems caused by their clouded title.[91] The interests of purchasers of original trust land are directly adverse to those of the class and, therefore, were excluded from comments categorized as class comments.[92]

Comments from the general public who indicated no connection with the mental health community also were not categorized as comments from the class.[93]

The court read every comment received by October 21, 1994, including those from the general public and purchasers of trust land. However, the court's consideration of the comments was weighted according to whether or not it was categorized as a class comment.

Counsel for H.L. urged separate consideration of comments from the general public, arguing that the court should consider the "public interest" and the fairness of the settlement to all persons affected by it. Proponents' Memorandum Re: Class Comments, at 5-6 (Nov. 14, 1994). Notice was certainly broad

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[91]These purchasers appeared to mistakenly consider themselves "beneficiaries" of the trust or the settlement because they had purchased trust land.

[92]Naturally, virtually all purchasers of trust land favor approval of the settlement in order to clear title to their land. If this case went to trial, such purchasers would be defendants in this case. It would be inappropriate for the court to give the comments of purchasers the same weight as the class comments.

[93]The court rejects the State's suggestion that every resident of Alaska is a class member. Carried to an extreme, the same could be said of all United States residents, because they might move to Alaska and later require mental health services. While it is true that any person theoretically could need mental health services in the future, most Alaska residents do not have sufficient experience with mental health services to enable them to comment as class members or their representatives. Moreover, unless people perceive themselves as potential beneficiaries, it is unlikely that they would identify with the beneficiaries' interest in the settlement.

enough to give all persons who might be affected by this settlement, including purchasers of original trust land, an opportunity to bring their concerns to the court's attention. However, comments from individual members of the public are not necessarily the same as the "public interest." In the present case, the public comments were a diverse and often conflicting mixture of concerns including enforcement of the trust, society's responsibility to care for the mentally ill and retarded, the cloud on state and private land titles, economic development, and moving public money and energy to other issues. Although this settlement must be consistent with the Enabling Act, the court concludes that the "public interest" is not an independent factor for analysis. The court must give full consideration to the views of class members and their representatives in light of the court's fiduciary duty to act as guardian of the interests of the class. Welsch v. Gardebring, 667 F. Supp. 1284, 1295 (D. Minn. 1987). Therefore, the court gave little weight to public comments as compared to the weight given to class comments.

Mr. Gottstein and Mr. Walker expressed concern that some people submitting written comments might falsely claim to be beneficiaries or to have family members who were beneficiaries. Motion in Limine Re: Public and Class Comment, at 7-8 (Oct. 12, 1994). The court believes there are few people who would claim to be mentally ill or to have a mentally ill family member unless the claim was true. A review of written comments shows there is a greater likelihood for some class members to have indicated they were members of the public, not realizing or not wanting to admit they qualified as members of the class.[94] In addition, at the final hearing the court observed that the overall ratio of class comments

[94]Indeed, among the forms counted as class comments by the court were those marked "member of the public" where the commentators described themselves as suffering from a mental illness or discussed a family member who was mentally retarded or mentally ill.

for and against the settlement was approximately the same as the ratio for written class comments.[95]

Mr. Gottstein and Mr. Walker requested that class membership or representation of a class member be verified prior to acceptance of a comment as one from the class. Motion in Limine Re: Public and Class Comment, at 7-8 (Oct. 12, 1994). The court has rejected this suggestion. Verification would be impossible in some instances and would raise privacy issues.

The court finds the concerns about an overinclusive method of notice to be misplaced.[96] Comments were sought from this class to obtain a sense of how class members or their representatives viewed the proposed settlement. Contrary to the misconceptions of Mr. Gottstein, Mr. Walker, and a few individuals who submitted comment forms, the court does not view the comments as a vote which would determine the court's decision. The reaction of the class to the settlement proposal is only one of several factors the court must consider in its decision regarding whether to grant final approval.[97]

The reasons behind the class comments were at least as important to the court as the actual tally of class comments "for" or "against" the settlement. A democratic vote by informed class members with a full understanding of the issues bearing on the

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[95]The court believes it extremely unlikely that anyone would appear in person before the court and falsely claim to be a class member or to have a close connection to the class. One mother of a beneficiary spoke convincingly of the courage required of her to speak publicly of her child's problems because of the stigma society continues to attach to mental illness. Final Hearing (Nov. 1-2, 1994).

[96]Ironically, the more common problem with notice in class actions is insufficient notice that excludes many class members. If notice in this case had been sent only to current recipients of state mental health services, as Mr. Gottstein and Mr. Walker urged, all past and future beneficiaries who were not current recipients would have been excluded. Also excluded would be class members for whom the state does not currently offer services. The number of class members fitting into this latter category could be fairly large.

[97]The reaction of the general public is not a factor.

settlement in any large and complex class action would be impossible. In re Agent Orange, 597 F. Supp. at 760-61. A court has the authority to approve a settlement even when a significant percentage of the class or named plaintiffs oppose it, as long as the court determines the settlement to be fair, reasonable and adequate and in the best interests of the class. See, e.g., Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1421-22 (D. Minn. 1987); see also Armstrong v. Board of School Directors, 616 F.2d 305, 326 (7th Cir. 1980) (opposition is relevant but "not dispositive even when many class members object"). This is particularly likely where a case is long and complex and most class comments reflect a lack of understanding of the legal issues underlying the lawsuit or the risks and uncertainties inherent in a trial. See Armstrong, 616 F.2d at 326; In re Agent Orange, 597 F.Supp. at 759.

2. Results of written comments

Overall, written comments from the class were approximately two to one (2:1) in favor of approval for the settlement. Approximately three hundred beneficiaries, family members, guardians, advocacy groups, and mental health workers said the court should "approve" the HB 201 settlement. Almost one hundred and fifty beneficiaries, family members, guardians, advocacy groups, and mental health workers urged the court to "reject" the settlement.[98]

Despite the publicity this case has received during the past several years, the comments reflected much confusion and many misconceptions regarding this case, class actions generally, and

[98]The court may approve or reject a class settlement, but has no authority to amend it. Manual for Complex Litigation, Second § 30.41, at 237. When the person commenting placed conditions on acceptance that were not part of the settlement or stated that the settlement should be accepted only if amended, the court considered the comment to be recommending rejection. At the same time, the court recognizes that some of these people might not have chosen rejection if they had thought rejection would lead to trial rather than to a new settlement.

settlement of class actions in particular. The written comments indicated that few people obtained information beyond the notice.

Many people commenting appeared to believe that the trust and beneficiaries would receive nothing if the settlement is not approved. Many commented that the settlement should be approved simply because society has an obligation to help the mentally ill and retarded.

Several class members or their families provided no reason for their recommendation of approval or rejection. This made it impossible for the court to determine whether they had at least a rudimentary understanding of the case and settlement.[99] A few class comments did not directly recommend either approval or rejection of the settlement and showed enough confusion about the case and settlement that the court was forced to count the comment as "unknown." For the purposes of an overall tabulation of class opinion, however, class members who marked a box for acceptance or rejection while not providing a reason were assumed to have the same degree of understanding as the majority of the class or their representatives. The court views the "approve" and "reject" tabulations as merely indicative of the general trend of class opinion. Of greater interest to the court are the reasons given for approval or rejection.

Many commentators volunteered the opinion that mental health services in Alaska are presently inadequate, and some describe long waiting lists or the complete lack of a particular service. Some of these people urged the court to approve the settlement so that mental health services could be expanded. Others who described inadequate services believed the legislature would use the existence of the trust fund as an excuse to cut appropriations from the general fund for mental health, particularly

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[99]Mr. Jessee's October 24, 1994, affidavit was helpful with regard to eight comments from mentally retarded class members residing at Hope Cottages. The affidavit shows the difficulties in evaluating comments from a class containing members who are mentally challenged.

as oil revenues decline.[100] Still others urged settlement approval because they believed the legislature had expressed frustration with the lack of a settlement by cutting funding for mental health services.

Class comments opposing settlement had concerns that included: (1) DNR would manage the trust lands; (2) the value of the lands in the reconstituted trust was much lower than the value of original trust lands; (3) the active Usibelli coal leases were not included in the reconstituted trust; (4) a legislature in the future could make changes adverse to trust beneficiaries; and (5) there was no guarantee of adequate funding for even the current level of state mental health services.

One of the biggest concerns of those opposing the settlement was DNR management of trust lands. A few seemed incensed that the same agency which breached the trust in the beginning would continue to manage trust lands under the settlement. Some believed DNR was simply incompetent and incapable of maintaining accurate records of trust lands. People concerned about DNR management preferred an agency outside of the existing structure of state government to manage the land. A few indicated that the Trust Authority alone should have control over all of the trust assets.

Another major concern expressed in class comments opposed to the settlement was the inadequacy of the total compensation to the trust. Some were disturbed that the total

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[100]Several commentators viewed the recent reduction in beds at the Alaska Psychiatric Institute as an example of the legislature's inclination to reduce the present level of mental health services. The Commissioner for the Department of Health and Social Services, however, indicated the reduction in services at API was based on a professional decision. Final Hearing, testimony by Commissioner Lowe (Oct. 25, 1994). Commissioner Lowe stated that no one who met the criteria for admission had been denied admission to API. Id. The modern trend for such hospitals is to provide tertiary care for very serious complex cases of mental illness and shorter crisis-oriented care. Id. On the other hand, the Commissioner admitted that the change in policy for API was occurring more rapidly than initially planned due to budget cuts. Id.

number of acres in the reconstituted trust was less than the original one million acre grant. Several thought the trust should receive both the surface and subsurface estate for all trust lands. The belief that the land being returned to the trust was not as valuable or productive as the land lost to the trust was frequently expressed, often with the opinion that the Usibelli leases should be included in the reconstituted trust. Several people concerned about land values stated that the State should at least pay fair market value for unreturned land and they did not believe the settlement was adequate in this respect. A few thought the State should pay for all surveys of trust lands and encumbrances. There was an underlying sentiment that the State was not being sufficiently penalized for breaching the trust.

Other common concerns involved the legislature and funding. Several class comments expressed fear that the legislature would make adverse changes in the future or even repeat the redesignation action that precipitated this case. These people longed for assurances that this would not happen. Many of those opposed to the settlement believed that the legislature would use the existence of the trust as an excuse to cut mental health funding from the general fund. Some of these people felt they were getting little from the settlement because most mental health services would remain dependent on appropriations from the general fund.

Class comments in favor of approval for the settlement provided reasons such as (1) more energy should be spent on the provision of services rather than on litigation; (2) the HB 201 settlement was the best the class could get and further litigation would not produce better results for the class; (3) the case had lasted long enough and the time had come to settle; and (4) the combination of land, cash, and the Trust Authority was adequate as a settlement, and more litigation would not be likely to bring a better result.

Many class comments favoring approval simply stated it was time to end the case and move on to providing services for the beneficiaries. They believe money should be diverted from

litigation to services for beneficiaries. One class member said he needed unavailable services now and could not wait any longer. Another person wrote a detailed description of the lack of services in bush villages and urged approval of the settlement so that more services could be provided.

Several commentators liked the idea of a cash fund managed by the Alaska Permanent Fund Corporation. A few found no problem in DNR management as long as the Trust Authority had oversight. Several thought that having the Trust Authority determine how trust income is spent would eliminate some of the politics from mental health budgeting. These people and others believed that mental health funding needed to be more stable; some added that beneficiaries needed to be able to depend on the continuing availability of services. They believed the Trust Authority could provide this stability.

3. Class comments at the final hearing

The court allowed an opportunity for oral comments from class members, families and organizations in an Anchorage courtroom all court-day on October 24, at the Alaska Psychiatric Institute in the evening of October 25, and in a Fairbanks courtroom from 2:45 p.m. to 6:00 p.m. on November 1 and 2. A total of 79 people commented during the hearing, 35 in Anchorage and 44 in Fairbanks. Because the overall number of people wishing to make comments during the final hearing was small, the court permitted a few members of the public to speak. As with the written comments, the court considered only the 67 comments from people connected to the class to be class comments relevant to the issue of whether to grant final approval of the settlement. The court has entered a single tabulation for those who commented orally and in writing.

Overall, nineteen class comments in Anchorage favored approval, eleven favored rejection, and two could not be determined. In Fairbanks, twenty class comments favored approval, thirteen favored rejection, and two could not be

determined. The majority of class comments came from close family members of beneficiaries and representatives of organizations rather than from beneficiaries themselves.[101]

People who favored approval of the settlement were often more resigned than enthusiastic. Some commented that attention should switch from litigation to the provision of services. A few were concerned that money spent on litigation was taking money away from mental health programs. They believed that settlement would bring more funding for programs benefiting beneficiaries. Overall, class comments in favor of approval reflected a feeling that the case had lasted long enough and that this settlement was adequate or at least the best result the class could get.

The Trust Authority was viewed as a major benefit of the settlement. In this regard, one family member pointed out that by having DNR manage the land and the Permanent Fund Corporation manage the monetary corpus, the Trust Authority could concentrate more on programs and services of direct benefit to the beneficiaries. It was hoped that the Trust Authority would be an effective advocate for mental health program funding when the mental health budget comes before the legislature each year.

One of the greatest concerns of those commenting against approval of the settlement was DNR management of trust lands. There was strong opposition to placing the agency which is viewed as having mismanaged trust lands in the past in charge of the reconstituted trust lands. The fact that the trust lands would be managed by a separate unit seemed not to have significantly decreased the distrust of DNR.

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[101] Among the organizations represented at the hearing were Advocacy Services, Alaska Addiction Rehabilitation Services (Nugen's Ranch), Alaska Alliance for the Mentally Ill, Alaska Crippled Children's Association, Alzheimer's Association, Anchorage Alliance for the Mentally Ill, Fairbanks Alliance for the Mentally Ill, Fairbanks Resource Agency (provider of services for developmentally disabled and Alzheimer's patients), Governor's Council for the Handicapped, Independent Living Council (Access Alaska), and Project Teach (services for developmentally disabled).

Some of the objectors believe the class will not benefit from this settlement. They are convinced that the legislature will not adequately fund mental health programs from the general fund so that income from the trust will be used entirely to continue funding current services rather than to provide new or expanded services. They point out that income from the initial $200 million will not come close to meeting the annual $130 million budget for state services for beneficiaries. As a result, they feel the class has nothing to lose by continuing with litigation. In answer to the court's question regarding their choice between the HB 201 settlement or trial, all but one of the objectors preferred trial.[102]

Some people who spoke against the settlement obviously feel terribly wronged by the State's breach of the trust. They view the State as untrustworthy and perceive a continued reluctance on the part of the State to care about the needs of the beneficiaries. Many view the non-settlement provisions of HB 201 as an unfair threat by the legislature. Many felt that the legislature could not be trusted in the future. More than one person spoke of seeking justice. There seemed to be a sense of outrage underlying the comments of those opposing the settlement.

4. Conclusion

The court has carefully read and considered every written class comment. During the final approval hearing in Anchorage and Fairbanks, the court carefully listened to every comment and has considered each one. The time expended by family members, beneficiaries, and their advocates to bring their concerns about the settlement to the attention of the court was sincerely appreciated. The court recognizes that speaking in person to a judge, particularly in a formal courtroom, was not an easy task for many people.

Those on either side of this emotional issue will undoubtedly feel betrayed if this court's decision is opposite their

[102]Few of the objectors choosing trial exhibited a full appreciation of the complex legal issues facing the litigants at a trial of this case or of the risks and costs inherent in any complex litigation.

own opinion. Those favoring the settlement believe the result for the class could be worse if this settlement is not accepted. They are convinced that the settlement is adequate at present and that further litigation will bring nothing better. Those opposing the settlement see no benefit for the class in the HB 201 settlement. They believe the class has nothing to lose by continuing the litigation to trial. The court notes that even with a two to one ratio in favor of the settlement, the objections among the class are not far from insignificant.

Two people who commented at the session held at API aptly illustrated the division among the class in this case. One woman, whose family member is a beneficiary and who had followed the case closely for the past six years, spoke in favor of the settlement. She talked about the importance of the Trust Authority and the program improvements. She opined that another settlement was not likely to be better than this one. She acknowledged that this settlement "won't answer the prayers of the beneficiaries and their families." A man who also had a family member who is a beneficiary spoke later against the settlement. He talked about the need to reinstate the trust and to assure that the trust is protected in the future. He too acknowledged that this settlement would not answer the prayers of the beneficiaries and their families, but he believed it was essential to fight on until they achieved something that would. On the whole, the class sees that there are problems with this settlement. Some would choose to accept the agreement as the best that can be achieved and turn their energies to the future. Others would choose to reject this settlement and any other unless the settlement was what all desire, assurances of a comprehensive mental health program which is fully funded and a trust which is guaranteed to pay the full costs of such a program.

The class comments were helpful in defining the differences between those who favor the settlement and those who oppose it. The court was touched by the sincerity of all who chose to write or speak and by the depth of their concerns. The class comments did not raise any new issues which had not been

presented by counsel, but they gave breath to the statistics and life to the many whose lives will be affected by this litigation. The court serves a fiduciary role in analyzing this proposed settlement. The class comments highlighted for the court the hopes and fears of the class and their families. The court has kept those images paramount when analyzing the complex facts and calculations which go into this decision.

The court agrees that there are problems and risks associated with this settlement. An ideal settlement would have included the leased coal lands in the Healy and Beluga fields,[103] provided for total responsibility and control of trust assets by a trustworthy fiduciary with total awareness of trust responsibilities, and would have assured the beneficiaries that necessary services would have guaranteed funding. This settlement is not ideal. It may not even be the best settlement that has been offered to the plaintiffs. However, the limited role of the court mandates that the court not compare the settlement with an ideal one. The task is to decide whether this settlement is "fair, adequate, and reasonable."

Considering all these factors, the court concludes that when viewed with other factors considered for final approval, the class opposition to the HB 201 settlement is not of a type or amount to preclude final approval of the settlement.

F. Experience and Views of Counsel

The four attorneys for the class have disagreed about both of the two most recent proposed settlements, Chapter 66 and HB 201. Those objecting to the previous Chapter 66 settlement urge approval of the present HB 201 settlement; those who urged approval of the Chapter 66 settlement now object to the HB 201 settlement.

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[103]The only reason to exclude these lands was the political power of the coal industry. Complete justice would have demanded their return to the trust.

Newberg on Class Actions suggests that the weight accorded to the recommendation of counsel is dependent on factors such as (1) length of involvement in the litigation, (2) competence and experience in the particular type of litigation, and (3) the amount of discovery completed. Newberg on Class Actions § 11.47, at 11-112. In this case, Mr. Walker and Mr. Gottstein, who object to the settlement, have the longest involvement in the case. However, one or two fewer years involvement by Mr. Jessee, counsel for the developmentally disabled, and Mr. Volland, counsel for chronic alcoholics, is insignificant in the context of a twelve-year lawsuit. Mr. Gottstein has more experience with land issues, but Mr. Volland has more experience with class action settlements. In addition, Mr. Volland relied on the expertise of others more knowledgeable in land matters, including Mr. Gottstein's land staff, during negotiations for HB 201.

Some of the objections raised by Mr. Gottstein and Mr. Walker were addressed by the September amendments to HB 201 and HB 371. However, their primary objection is based on their argument that the original trust lands were much more valuable than the combination of land, cash, and the Trust Authority in the HB 201 settlement. This is a factual issue which occupied a major portion of the final approval hearing. Both sides presented the testimony of experts to support their valuation.

The court concludes that counsel for the class supporting the settlement, Mr. Volland and Mr. Jessee, had sufficient experience and access to knowledgeable staff to represent the class adequately. With the views of the four class attorneys equally divided, the court does not consider the support or opposition of the attorneys to be persuasive in determining the fairness of the settlement.

G. Defendant's Ability to Pay (Feasibility of the Settlement)

Given the decline in oil revenues, a settlement such as this one which contains primarily land and some cash is more feasible than one containing more cash. The legislature has already passed

legislation appropriating the $200 million and providing for the land conveyances, establishment of the Trust Authority, and changes in the budgeting process for the mental health programs. Ch. 66, SLA 1991; Chs. 5-6, FSSLA 1994; Chs. 1-2, SSSLA 1994. The court concludes that the State is capable of performing the agreement.

H. Extent of Discovery Completed

The extent of discovery completed is considered because it is an indicator of the ability of the court and counsel to evaluate the merits of the class claims. Armstrong, 616 F.2d at 325. In this case there has been extensive discovery of some types of information and little or no discovery regarding others.

There appears to have been little discovery with regard to the amount the State has spent on past services for beneficiaries. The State has, over the years, provided lists of such expenditures. The plaintiffs have disputed those lists as overinclusive. Evidence of such expenditures would be required at a trial in order to calculate the amount of setoff to which the State might be entitled.[104]

There appears to have been little or no discovery regarding evidence of the State's mismanagement of the trust which could mitigate the setoff for state expenditures on the mental health program. There has been little, if any, inquiry into receipts before the redesignation legislation for which the State has never accounted. Similarly, there are several issues raised in AMHA's Second Amended Complaint that have not been pursued up to this point.

In contrast, extensive discovery has been done with regard to land values and third party titles. These would be major issues at a trial. During implementation of the Chapter 66 settlement, the

[104]Despite the legislature's attempt to establish the setoff amount unilaterally in HB 201, the court views the amount of setoff to be a factual question appropriately determined through the presentation of evidence before a trier-of-fact.

plaintiffs' land office created and collected substantial information about the original mental health trust lands and other state lands which were potential substitute lands. The court also ordered DNR to permit plaintiffs' attorneys the opportunity to review DNR's public files. Memorandum Decision and Order Re: Discovery Motions, at 54-56 (June 3, 1994).

It appears that no amount of additional discovery would completely resolve the land valuation issue. Most of the value attributed to the original and substitute trust lands comes from mineral potential. The mineral potential of most of the land appears to be speculative, inasmuch as virtually no drilling has been done on the lands. The reports and expert testimony at hearings has provided extensive information on this issue.

The court concludes that plaintiffs' attorneys had sufficient information, under the circumstances, with which to negotiate this settlement and evaluate the difficulties of obtaining full relief at trial. The court also finds that the information presented to the court during the preliminary and final approval process has been adequate for the court's evaluation of the settlement and the risks of continued litigation.

VI. RESPONSE TO MAJOR OBJECTIONS TO THE SETTLEMENT

Weiss and AMHA believe that further litigation would at a minimum result in a requirement that the trust be managed solely in the interests of beneficiaries as well as recovery of most of the original trust lands.[105] Weiss & AMHA Opp. to Approval, at 15. They believe that the minimum acceptable settlement should provide the same result. Id. The court believes Weiss and AMHA have overestimated what they will be able to prove at trial and have

[105]Weiss and AMHA expect that all of the original trust lands could be recovered except "(1) parcels subject to land sale contracts (2) parcels actually occupied and used by State agencies, and (3) parcels conveyed to CIRI, although land received in exchange with CIRI could be recovered. Weiss & AMHA Opp. to Approval, at 15.

underestimated the risk that the trust corpus could be smaller after further litigation. However, the settlement should not be judged in comparison with the maximum possible recovery if the class claims were fully litigated. See In re Agent Orange, 597 F. Supp. at 762. The risks accompanying continuation of litigation must be considered simultaneously with the strengths of the plaintiffs' case. Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1408 (D. Minn. 1987). Avoidance of the risks of litigation justify a settlement smaller than the maximum possible remedy.

A. Inadequate Compensation for Value of Original Trust

Weiss and AMHA contend that the total value of the original trust is approximately $1.9 - 2.0 billion, while the value of the HB 201 settlement is $750 million.[106] Weiss & AMHA's Opposition to Final Approval of HB 201 Proposed Settlement, at 4 (October 12, 1994). The assumption that a trial would result in a reconstituted trust valued at approximately $2 billion underlies their argument that the settlement is inadequate. Weiss and AMHA believe that most of the original trust lands could be recovered. Weiss & AMHA Opp. to Approval, at 10, 15. The court disagrees. Weiss and AMHA also insist that the original trust lands could produce enough revenue to meet the necessary expenses of a basic mental health program at least for the trust beneficiaries in greatest need of services. Weiss & AMHA Opp. to Approval, at 21; see also Ch. 66, § 26, SLA 1991 (priorities among beneficiaries). The court disagrees.

Weiss and AMHA suggest that much of the disagreement over value could be avoided by conveying to the trust all original trust land not conveyed to third parties. Weiss & AMHA Opp. to Approval, at 6. They argue that the State's refusal to take this

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[106]The $750 value is derived from an application of Mr. Erickson's deductions. The court stands by its position discussed in the Memorandum Decision on Preliminary Approval that this is comparing apples to oranges. To truly compare original trust to the settlement one would have to make deductions from the $1.9 - 2.0 billion as well. Doing so results in approximately equivalent values.

action is evidence that the original trust lands are more valuable than the State claims. Id.

Weiss and AMHA's argument ignores the fact that over 300,000 acres of the original trust lands are in legislatively designated areas such as parks and wildlife areas. The primary reasons the State refuses to relinquish these lands are reflected in the purposes for the legislative designations rather than in the development value of these lands. In addition, Weiss and AMHA ignore the high probability that trust lands in state parks and similar areas would be extremely difficult to develop due to strong opposition by environmental groups, recreational interests, and others interested in the preservation of whatever wildlife habitat or other values the legislative designations were intended to protect.

Weiss and AMHA argue that delay in production of revenue from some trust lands, particularly those in legislatively designated areas, should not reduce the estimated value of the original trust. Weiss & AMHA Opp. to Approval, at 7. However, delay in revenue production from land due to the time required for development is a valid consideration when compared with the immediate revenue production potential of $200 million in cash. Not only will the cash payment into the trust fund produce revenue sooner, but the risk of producing no revenue at all is much lower than with land development.

Weiss and AMHA have argued that significant development would have occurred sooner on original trust lands if the State had managed them properly. Possibly more drilling to obtain detailed mineral information would already have been done in the most promising mineral areas on trust lands. However, testimony during the final hearing indicated that only one large-scale hardrock mine, the Red Dog Mine, presently operates commercially in Alaska. Original trust land comprises only a small percentage of the total land area in Alaska. If mismanagement was the sole reason for lack of mineral development on trust land, one would expect more than one large hardrock mine to be operating in the state.

B. Specific Lands Comprising the Trust Under HB 201

Weiss and AMHA object to the exclusion of certain original trust parcels, especially those which are already producing revenue. Although the land trust as reconstituted by HB 201 is composed of parcels chosen by plaintiffs' attorneys during the Chapter 66 settlement process, Weiss and AMHA argue that the most valuable parcels in the Chapter 66 settlement are not included in the HB 201 settlement. For example the original trust contained coal deposits in the Healy and Beluga regions, including Usibelli coal leases, which are not being returned under HB 201. The State refused to include these coal lands in the settlement, presumably to avoid objections to the settlement by the coal industry. Class members opposing the settlement point out that royalty payments from the Usibelli leases could have been an immediate source of revenue from trust land without the development delay necessary on most trust lands. Another potential source of revenue are material sites on original trust land that are likely to be used for road construction or other construction projects. Some of these sites have been included in the reconstituted trust under HB 201, but others have not.

Weiss and AMHA argue that elimination from the trust of all parcels to which there existed any serious objection during settlement negotiations has significantly decreased the potential for revenue production from trust lands. Weiss & AMHA Opp. to Approval, at 17. Several class members expressing opposition to the settlement were suspicious that trust lands no one else wanted were not worth much. Given that so many non-class interests appeared to have "first pick" from original trust lands and the pool of potential substitute lands, the suspicions of class members are quite understandable.

Everyone agrees that the lands in the reconstituted trust under HB 201 have a total value less than that of the original trust lands. The difference in value is compensated with the $200 million cash payment and establishment of the Trust Authority. Weiss and AMHA themselves state that the $200 million cash can

be expected to annually earn approximately six times the amount of the royalty from the Usibelli lease. If litigation continues, the trust is unlikely to obtain any cash with which to earn an immediate annual income of six million dollars. In addition, at least one substitute parcel has high mineral potential since a portion has been leased for the Fort Knox gold mine near Fairbanks.

Groups which intervened in opposition to Chapter 66 were actively included in negotiation of the HB 201 land lists. Coal companies, oil companies, environmental groups, and hardrock miners were included in negotiations for the HB 201 settlement to avoid the kind of opposition that greatly delayed and complicated the court's consideration of the Chapter 66 settlement. There has been no outside opposition to HB 201.

Proponents of the settlement also hope the early involvement of environmental groups will enable the trust to develop most trust lands without interference from environmental interests. This should decrease the amount of time and money necessary to develop many of the trust lands, thus increasing the overall net revenue to the trust.

C. Possibility of Legislative Actions Contrary to the Settlement

A major concern of class members objecting to the settlement is the ability of the legislature to pass legislation in the future that would materially change the terms of the settlement after the claims of the class have been dismissed with prejudice. It is true that nothing in HB 201, the Settlement Agreement, or this decision can prevent a future legislature from passing legislation affecting the trust, but there are remedy provisions if this happens and deterrents exist.

First, the State has specifically agreed in the Settlement Agreement not to oppose a new action brought by plaintiffs under Rule 60(b) for relief from judgment in the event of a material

breach of the Agreement.[107] Settlement Agreement, art. VI, §§ 5 and 7, at 14-15, 17; see also State's Reply to Weiss' and AMHA's Opp. to Approval of HB 201 Proposed Settlement, at 34 n.23 (October 19, 1994) (reflects State's intent). A few class members have expressed the fear that a court receiving such a motion would be reluctant to grant such relief unless the legislature's action is particularly egregious. Nevertheless, the Rule 60(b) motion is an available remedy for a material change made in this settlement unilaterally by a future legislature. Alaska R. Civ. P. 60(b)(6). For as long as any legislators remember this lawsuit or have heard of its impact on state land, the threat of litigation alone will be a powerful deterrent.[108]

Of course, if a court grants plaintiffs relief from the judgment dismissing their claims with prejudice, the State would be expected to argue that HB 201 was curative legislation which retroactively made the 1978 redesignation valid. See State's Opening Pre-Hearing Memorandum in Support of Final Hearing, at 22-26

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[107]The following provisions of HB 201 constitute material terms of the agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50, and 51 of HB 201 and sections 1 and 2 of HB 371. Settlement Agreement, art. VI, § 5, at 15 (June 10, 1994). If the Legislature materially alters or repeals any of those provisions, the plaintiffs' remedy is a new action alleging that the mental health trust has not been adequately reconstituted and seeking whatever relief may be appropriate in light of the plaintiffs' claims. Settlement Agreement, art. VI, § 5, at 15. The Settlement Agreement also provides that "failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment [pursuant to Alaska Civil Rule 60(b)(6)] and no party shall oppose such a motion." Settlement Agreement, art. VI, § 7, at 17.

The State has specifically declared that if a future legislature materially alters or amends any of the material terms in HB 201, the State could not defend on the ground that the plaintiffs had agreed in the Settlement Agreement that the trust was adequately reconstituted. State's Reply to Weiss' and AMHA's Opposition to Approval of HB 201 Proposed Settlement, at 34 n.23 (Oct. 19, 1994); Settlement Agreement, art VI, § 5, at 14. The plaintiffs could file a new case at essentially the same place at which this case is being settled. State's Reply, at 34 n. 23. The only major difference would be the effects of time on land titles and land usage.

[108]The institutional memory of the legislature may not be long, but one function of the Trust Authority is to serve as a reminder of the trust obligations owed to the beneficiaries.

(Oct. 11, 1994). The State's ability to make such an argument is not a flaw in the settlement, but is merely a result of the legislature's passage of HB 201 and HB 371. The State has already suggested that such an argument will be made if this settlement fails and litigation continues. Plaintiffs would be in the position they will be if the settlement is not approved.

Second, the Trust Authority will exist as an advocate for the trust. The Trust Authority can be expected to actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority also may be in a position to influence the governor to veto any legislation which makes a material change in this settlement. Given the notoriety of this case, it is unlikely the legislature could override such a veto.

Third, stability in land titles and state land management is in the interest of third parties, such as purchasers of state land, hardrock miners, and oil companies. Such third parties would undoubtedly lobby the legislature to maintain stability in land titles in order to avoid disrupting land development in Alaska with another lawsuit.

D. DNR Management

One of Weiss and AMHA's concerns about DNR management of trust lands under HB 201 is the section 17(b) requirement that trust lands be managed under laws applicable to other state lands. Weiss and AMHA suggest that the "maximum management for the benefit of the Trust achievable under the HB 201 regime is the minimum permissible under the Enabling Act." Weiss & AMHA Opp. to Approval, at 20. They seem to ignore the reference in section 17(b) to subsection (a) of section 17 which means that management under state land laws is subject to the State's trustee duties under the Enabling Act. At the same time, their concerns legitimately arise from an emphasis in the language of section 17(b) on management according to laws applicable to the

State's general grant lands rather than management for the benefit of the trust.

Another concern about section 17 is the provision within subsection (c)(4) calling for "management for multiple use of trust land." The term "multiple use" is a common land management term, and yet the meaning often varies with one's viewpoint. With regard to mental health trust lands, environmental groups can be expected to emphasize recreation, fish habitat protection, and similar uses involving little development. Mining and forestry interests will emphasize uses involving the extraction of natural resources.

Subsection (c) lists three other considerations which the regulations implementing section 17 management of trust lands must address, two of which are "maintenance of the trust land base" and "management for the benefit of the trust." Ch. 5 § 17(c), FSSLA 1994. Weiss and AMHA discuss the existence of a conflict in the HB 201 management scheme. If section 17 is viewed in its entirety, however, there is actually no conflict between the subsections. Management for multiple use of trust land is appropriate to the extent that all management decisions are made in accordance with trust principles. Ch. 5 § 17, FSSLA 1994. For example, a parcel might be suitable for a temporary interim use until a particular resource can be extracted more profitably or a material site might be sold or leased for another use after the usable material has been extracted. It might be possible to sell the timber on a parcel before a mine is developed.

HB 201 requires DNR to consult with the Trust Authority as well as submit annual reports describing management activities on trust lands.[109] Ch. 5 § 9, FSSLA 1994. The separate trust unit of DNR probably will be funded by money allocated from the trust

[109]DNR must obtain actual approval from the Trust Authority before exchanging trust land under AS 38.05.801(b)(2).

income account by the Trust Authority.[110] Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041). See also Settlement Agreement, Att. C & D (June 10, 1994) (Reimbursable Services Agreement will probably be used to pay DNR from trust account). When the Trust Authority contracts with DNR to manage trust land, as required by HB 201, the Authority can include provisions requiring DNR to actively promote mineral exploration or other development activities deemed appropriate by the Trust Authority. See Ch. 5 § 9, FSSLA 1994.

E. Trust Authority Has Responsibility for Preserving Trust Assets Without the Management Authority

Weiss, AMHA, and some of the class comments opposing the settlement are concerned about placement of fiduciary responsibility with the Trust Authority while actual management authority is in the hands of DNR and the Permanent Fund Corporation. Both agencies managing trust assets are required only to consult the Trust Authority in most circumstances.[111] The objectors insist this gives DNR and the Permanent Fund Corporation power over trust assets without any accountability, because the agencies have no express fiduciary responsibility to the trust. They object to the Trust Authority bearing the burden of being responsible for proper management of trust assets without the power to direct the management.

The advantage of this split in responsibilities is that each of the three entities can concentrate in their area of expertise. The Alaska Permanent Fund Corporation has demonstrated its ability to manage a similar monetary fund satisfactorily. There were few comments against management of the $200 million by the Permanent Fund Corporation. DNR has a marred history, but the agency has personnel with much experience and technical expertise

[110]HB 201 provides that money in the income account "may only be used for" six listed purposes, one of which is reimbursement to DNR for the cost of managing trust land. Ch. 5 § 16, FSSLA (to be codified as AS 37.14.041).

[111]One exception is the exchange of land, which requires Trust Authority approval. Ch. 5 § 9, FSSLA 1994.

in managing large tracts of land in Alaska.[112] This leaves the Trust Authority to concentrate on coordinating with the four legislatively-established groups representing the major beneficiary groups to plan services to meet the needs of beneficiaries and to budget the money to fund the services. The Trust Authority can hire staff, which makes the Trust Authority much more than advisory commissions of the past. For the first time, the mental health community will have an advocate within state government with the potential to draw attention effectively to the needs of beneficiaries.

The court agrees, however, that it would be better if either the Trust Authority had complete management responsibility or the Trust Authority was free not to contract with DNR and the Permanent Fund Corporation. However, this determination has little to do with whether the HB 201 should receive final approval. The court may not compare this settlement with an ideal settlement. The appropriate task is to compare this settlement with the likely results of litigation. The likely result of litigation is general directions to the State to manage the trust in the interests of the beneficiaries and under the Enabling Act. The court does not believe that DNR management with those directions would be better than management as provided by the settlement.

F. Concern Regarding Constitutionality of the Trust Authority's Power to Spend Trust Income

Weiss and AMHA argue that the Trust Authority's power to spend the trust's income free from further legislative appropriation is an illusion. They contend that the legislature did not clearly give the power to the Trust Authority in HB 201, and if

[112]In addition, the director of the separate unit is expected to be hired from outside of DNR. Final Hearing, Testimony of DNR Commissioner Harry Noah (Oct. 25, 1994). This will decrease the likelihood that previous DNR policies would be applied again to trust lands.

the legislature intended to give such a power to the Trust Authority, it may be unconstitutional.[113]

Only the Settlement Agreement expressly gives the Trust Authority the right to spend trust income free from further legislative involvement. Settlement Agreement, art. V, § 4, at 12. HB 201 grants the Trust Authority the power to administer the income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.039(a)). The purposes for which money in the trust income account may be used are listed in detail in HB 201. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041). HB 201 also specifically gives the Trust Authority the authority to award grants and contracts funded by money from the trust income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.045).

"[A]ny illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis." Armstrong, 616 F.2d at 320. Neither the Settlement Agreement nor HB 201 is obviously unconstitutional. When reviewing a settlement, a court should not rule on any legal issue not necessary for settlement. See Armstrong, 616 F.2d at 320.

G. Concern that the Legislature Will Cut Mental Health Funding From the General Fund

Despite the overwhelming concern about funding in many class comments, the claims brought in this lawsuit have no direct relationship to funding for services. The claims focus on the State's breach of the trust established by the Enabling Act in 1956. From the beginning of this lawsuit, there appears to have been misconceptions among many people about the extent to which the trust was capable of producing sufficient revenue to support the state's mental health program. There was no guarantee of adequate

[113]The Alaska Constitution grants the legislature the exclusive power to appropriate state funds. Alaska Const., art. IX, § 13.

funding in the original trust; the lack of guarantee in the settlement certainly cannot make it inadequate.

The HB 201 settlement expressly states that basic mental health funding will continue to come from the general fund. There is no pretension that the reconstituted trust will be able to support the state's basic mental health program. The legislature cannot avoid its responsibility to the state's mentally ill, mentally retarded, and other disabled Alaskans who are beneficiaries by reliance on the trust. One of the Trust Authority's functions will be to act as an advocate for the integrated comprehensive mental health program's general fund budget. The budgeting advantages should help the Trust Authority in that advocacy.

A related concern expressed by Weiss and AMHA is the possibility that the basic mental health program will receive insufficient funding from the legislature and that trust income will be spent on nonessential services. They believe the Trust Authority should be required to spend trust income on the basic program if the basic program is not adequately funded.[114]

Their underlying concern appears to be that the Trust Authority might spend the trust income on services for alcoholics and the mentally retarded, who are represented by counsel supporting the settlement, while services for the mentally ill are inadequately funded from the general fund. There is no reason to assume that the Trust Authority would favor one group over another. Each of the four beneficiary groups will be equally represented on the panel which recommends individuals to be members of the Board of Trustees of the Trust Authority. The Trust Authority has a duty to "deal impartially with the different trust beneficiaries." Ch. 5 § 8, FSSLA 1994, amending Ch. 66 § 10, SLA 1991 (to be codified as AS 37.14.007(b)(12)). In addition, the court has defined the beneficiaries in terms of the

[114]Ironically, the requirement desired by Weiss and AMHA could actually encourage the legislature to underfund the basic program.

groups who may not be excluded from trust-funded services. Memorandum Decision and Order, at 16-17 (April 27, 1988).

VII. CONCLUSION

Settlement involves compromise by all parties. The State could attempt to obtain a large setoff to eliminate any cash payment. The class could litigate third party interests and legislative designations in order to increase the amount of original trust land returned to the reconstituted trust. However, the costs in money and delay would be so enormous that it is doubtful any party would emerge better off. The beneficiaries of the trust would continue to wait for whatever benefits resolution of this case might bring them. Already one of the named plaintiffs, Carl Weiss, has reached adulthood without resolution of the case bearing his name. Even when viewed in the best possible light, litigation will not bring enough additional benefit to the trust and its beneficiaries to warrant the additional costs and delays required.

This case began in 1982 and the parties have attempted settlement since 1985. This settlement may not meet the expectations of the class for full funding of an integrated comprehensive mental health program, but it is fair, adequate, and reasonable under the circumstances of this case. In view of this settlement, continuing this litigation would merely "contribute to the seemingly Methuselean duration of this case," and would "sacrifice [both] justice and efficiency without any rational basis." Armstrong, 616 F.2d at 327.

The court is required to protect the interests of the class within its best judgment, considering all relevant factors. "The strong opposition of a considerable number of sincere and well-motivated members of the class cannot, under these circumstances, be decisive." In re Agent Orange, 597 F. Supp. at 763. There has been and continues to be a critical shortage of services for class members. Clearly mental illness, retardation, and other conditions within the class definition place a heavy burden on the individuals suffering from these conditions and their families. However, this

single case alone cannot resolve the funding crisis in the mental health field, no matter how compelling and real the need is for many class members. The citizens and the legislature of Alaska must face the obligation to provide adequate mental health services for the less fortunate among us.

This litigation has accomplished some very important things. First, it has made people aware of the mental health trust and the fiduciary obligation of the State with respect to that trust. The court does not believe that the State would dare treat these lands like other state lands without regard to the State's fiduciary obligations. If it does so, there are people and institutions prepared to stop the action before much damage is done. The beneficiaries, though perhaps weak by themselves, are strong together. They have advocacy groups with long institutional memories. The Trust Authority, if it does its job, will serve as a watchdog to ensure that neither DNR nor the legislature mismanages these trust lands again. Whatever else has been learned, it must have been learned that these lands must be managed in the best interests of the beneficiaries. If anyone tries to assert a lesser standard, without question there will be more litigation. If the State is wise, it will not fall back into this quagmire. Second, the litigation has provided a mechanism for the beneficiaries to influence both the funding of the comprehensive mental health program and the planning of state programs. The Trust Authority is an integral part of this settlement; without it, the court probably would not have granted final approval. Whether the reconstituted lands trust will produce or the original lands trust could have produced sufficient funds to maintain adequate services could be debated forever without resolution. However, it is clear that the sometimes powerless have been empowered. The Trust Authority can be a powerful advocate for the real needs of those who have so much difficulty advocating for themselves.

The settlement process as a whole has done some harm. The class and their families are very divided on the question of this settlement. Some may feel cheated and abandoned by this decision approving it. Others may feel vindicated. Hopefully, neither will

persist in those feelings. Whether or not to approve this settlement was a very difficult and complex decision. The court shares many of the concerns that have been expressed by the class. The task that lies ahead for the beneficiaries, their friends and families is to come together to make the best of this agreement. The beneficiaries will need to speak with one voice once again, if their concerns are not heeded. They need to heal the divisions that exist today and vow as recommended by one commenting beneficiary to go "out of the courts and into the budget."

The court is responsible for ensuring that the settlement is in the best interests of the class as a whole in view of all the factors to be considered in final approval. Given the circumstances of this case and the complex factual and legal issues that would arise in further litigation, the court finds that the settlement submitted for approval on June 10, 1994 is in the best interest of the class.

ORDER

For the reasons discussed above, it is ordered that FINAL APPROVAL for the settlement contained in Chapters 5 and 6, FSSLA 1994, Chapters 1 and 2, SSSLA 1994, Chapter 66, SLA 1991, and the Settlement Agreement signed on June 10, 1994 is GRANTED. The court is distributing a proposed dismissal order to the parties.

DATED at Fairbanks, Alaska this 6th day of December, 1994.

MARY E. GREENE
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; and ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; H. L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,	)	FILED in the Trial Courts State of Alaska Fourth District APR 27 1988
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

Case No. 4FA-82-2208 Civil

MEMORANDUM DECISION AND ORDER

This matter comes before the court to determine the intent of Congress in creating the public trust designed to meet the necessary expenses of the mental health program of Alaska in Section 202 of the Alaska Mental Health Enabling Act, Public Law 84-830 (1956) ["AMHEA"]. The matter before the court is the second stage in the litigation over the mental health lands. In State v. Weiss, 706 P.2d 681 (Alaska 1985), the Alaska Supreme Court held that the State breached its duty as trustee in its treatment of the mental health trust lands. The Court declared

invalid legislation which redesignated the mental health lands as general grant lands and remanded the matter for reconstitution of the trust. Since the remand, a number of advocacy groups have intervened as plaintiffs in the action. Additionally, in 1987, the legislature took significant action relating to the Alaska mental health trust in Chapter 48 of SLA 1987. This matter is before the court in a procedurally complex way. However, fundamentally, each of the parties is requesting a determination by the court that a particular group or groups either is or is not a beneficiary of the mental health trust. Although some of the motions have been framed in terms of redesignation of the class, clearly no one intends that the class be redesignated. What is at issue here is the definition of who is entitled to benefit from the trust. Because of the large number of parties and the disparate positions involved, it is useful to state the positions of the various parties.

Intervening plaintiffs Bosel, Doulin, Goodwin, and Mayoc ["Bosel"], argue that the mentally retarded and mentally defective are among the intended beneficiaries of the AMHEA land trust and that the State of Alaska does not have the authority to delete mentally retarded or defective persons as beneficiaries of the land trust. Through tracing the legislative history of the AMMEA, Bosel argues that Congress intended to benefit the mentally retarded or defective individual. Bosel further argues that based on the law as applied to land grants to the territories and basic trust principles, the State of Alaska cannot modify the trust provisions of the AMHEA to exclude mentally retarded or defective individuals from the trust.

The State of Alaska argues that the primary intent of Congress in the AMHEA was granting plenary authority to the Territory, now State, over its own mental health program. From this, the State argues that it is within the sound discretion of the State to determine what group or groups are to be served by the mental health program and thus are to benefit from the mental health lands trust. The State further argues that at the present time the legislature has removed the mentally retarded and mentally defective from the State's mental health program.

H.L., M.K., and Alaska Addiction Rehabilitation Services ["AARS"] assert that the Congressional intent was to fund a comprehensive program of integrated mental health services in Alaska, including in-patient, out-patient and preventative care. AARS argues that this comprehensive program was to address, at the very least, the needs of the territory's chronically and acutely mentally ill, chronic alcoholic, mentally defective, retarded and senile. AARS supports its position with legislative history. AARS also argues that the State has no discretion to determine the beneficiaries in that tie State must first apply the trust income to a comprehensive mental health program for the benefit of the chronically and acutely mentally ill, chronic alcoholic, retarded, and mentally defective.

Plaintiff intervenors Alaska Mental Health Association, Nanuwak and Martin, take the position that Congress determined the types of individuals to receive benefits under the AMHEA but left to the State the decision of how to meet the needs of those individuals. These plaintiffs argue that Congress deliberately excluded the mentally retarded and mentally defective from receiving benefits under the trust. The primary focus of the Alaska Mental Health Association's argument is that the State may not remove beneficiaries from nor add beneficiaries to those intended by Congress.

Plaintiffs Vern T. Weiss, et al., argue that Congress gave the Territory, now the State, the authority to determine its own mental health program; that under trust law principles, the beneficiary of the mental health trust established by AMHEA is the mental health program itself; and that the legislative history reveals that it was Congress' intent to exclude the mentally retarded and mentally defective from the trust; or alternatively, that even if the mentally retarded and mentally defective were originally included among the beneficiaries, they have been subsequently removed by the State pursuant to a rightful exercise of its delegated authority from Congress.

The Alaska Alliance for the Mentally Ill has filed a brief as amicus curiae. The Alliance opposes the positions taken by the State and by Bosel and supports the position taken by the Alaska Mental Health Association.

In order to answer the question posed in this portion of the litigation, it is necessary to analyze the legislative history of the Alaska Mental Health Enabling Act in some detail. In the Organic Act of Alaska, the act of August 24, 1912, 37 Stat, 512, the territorial legislature was precluded from changing the existing law regarding the commitment of the insane. Under the then existing law, a person was committed by being charged as if criminally with the offense of being an insane person at large. The issue was necessarily submitted to a jury for the determination of whether the person was sane or insane. There were no procedural safeguards protecting either the rights of the person accused of being insane nor the rights of the public with respect to dangerous individuals. Under this law, if a person was adjudicated insane they would be committed to the custody of the U.S. Marshals for transportation to a mental hospital. Throughout all or most of the time, Morningside Hospital in Portland received the persons from Alaska who had been adjudicated insane. Various reports give differing views as to the adequacy of care received by patients at Morningside. However, it is clear from the documents provided that there was much opposition in the Territory to the placement of patients in the facility at such great distance from friends and family. Thus, as Congress began to address the issues regarding the delivery of mental health services in the Territory of Alaska, there were two primary issues; (1) revision of the commitment procedures: and (2) the perceived need to treat Alaskan patients in a facility nearer to their homes. As the matters were considered, the corollary issue of funding for a mental health program by the Territory also arose. Prior to the 84th Congress, there had been several

unsuccessful attempts to modify the law. See Appendices S. T. U.1[1]

H.R. 6376, which ultimately became the Alaska Mental Health Enabling Act, was one of several bills introduced in the 84th Congress dealing with the issues presented by the mental health laws in Alaska. As passed by the House, H.R. 6376 had three main provisions. First, in Section 3 of the bill, the Territory of Alaska was granted the authority "to enact such laws as it may deem appropriate relating to the hospitalization (including commitment), care, and treatment of residents of or persons in Alaska who are mentally ill . . . ." Appendix I at 4. Second, in Title I of the bill, new commitment procedures for the hospitalization of the mentally ill were enacted, Under the authority of Section 2, the territorial legislature was empowered to supercede any of the provisions of Title I. Of particular note to the questions before the court, Section 101(i) defined the term "mentally ill individual" as "an individual having a psychiatric or other disease which substantially impairs his mental health or an individual who is mentally defective or mentally retarded." Appendix I at 5. Third, the bill provided grants to the territory to provide monies for the Territory's assumption of financial responsibility for the mentally ill. In Section 201, continuing, decreasing appropriations were made for "an integrated mental health program for the Territory, including the out-patient and in-patient care and treatment of the mentally ill as defined in Title I of the Alaska Mental Health Act," and a grant of $6.5 million was made "to be used in the construction of hospital or other facilities in Alaska needed for the carrying out a comprehensive program for the mentally ill as defined in Title I of the Alaska Mental Health Act. Appendix I at 33 and 36. In Section 202 of the bill, the Territory was granted the right to select land not to exceed one million acres from the public lands in Alaska. Subsection (e) of that section provided, in part:

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[1] All references to Appendices are to those supplied by Bosel, unless otherwise indicated.

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and the income therefrom shall first be applied to meet the necessary expenses of the program for the hospitalization and care of the mentally ill in Alaska. Such lands, income, and proceeds shall be Managed and utilized in such manner as the legislature of Alaska may provide.

Appendix I at 39-40. Given the usage of the term "mentally ill" in Title II, and particularly in Section 202(e), it is very likely that the House intended the lands trust to benefit the mentally ill as defined in Title I, i.e., people "having a psychiatric or other disease which substantially impairs [their] mental health" and people who are "mentally defective or mentally retarded."

Between the time that H.R. 6376 was passed by the House and its consideration by the Senate, there was a significant uproar from the far right. This uproar, sometimes noted as the "Siberia, U.S.A." discussions, was based on a misinterpretation of H.R. 6376; the detractors viewed H.R. 6376 as an effort to create one million acres in Alaska to be used as a gulag-type detention area for politically "wrong-thinking" people. During the bill's consideration in the Senate committees, there was a great deal of public comment and testimony regarding the much publicized misconception. See Appendix D. At least in part as a result of the "Siberia, U.S.A." discussions, a subcommittee in the Senate rewrote H.R. 6376 in an amendment which "[struck] all of these controversial provisions from the bill [Title I], leaving it up to the people of Alaska to enact their own mental health program." Appendix P at 1, Senate Committee Report No. 2053.

The legislative history of the Senate's consideration of H.R. 6376 provides some support to each side of this dispute. After the public hearings were concluded, the Subcommittee on Territories and Insular Affairs of the Committee on Interior and

Insular Affairs apparently went through a section-by-section markup. See Appendix D at 244-45; Appendix K; Appendix L; Appendix M; Appendix N: and Appendix O. The various committee prints considered during this time, taken in combination with the existing legislative history, provide some indication as to the thinking of the Senate subcommittee. The first in time of these committee prints is found in Appendix K.[2] This committee print points out recommendations made by the Association of American Physicians and Surgeons[3] and by the Departments of Health, Education and Welfare and Interior. One of the recommendations made by the AAPS was the elimination of the mentally defective and mentally retarded from the definition of mentally ill individual in Section 101(i). Appendix K at 5. The next committee print, Appendix L, added the comments of HEW to the committee print of Appendix R. HEW noted its opposition to the change proposed by AAPS and also stated:

> The change in the definition would have the effect also of excluding the mentally defective or retarded from provisions for institutional care or the benefits of the programs aided by grants under Title II.

Appendix L at 6.

Appendix M, Committee Print No. 4, April 20, 1956, shows both the Goldwater substitute and HEW proposed amendments.[4] In the original Goldwater substitute bill, Section 202(e) read, in part:

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[2] Although this is the first committee print submitted, it is apparent that the Goldwater substitute was available at least by March 23. See Appendix P at 21.

[3] The source of the Association of American Physicians and Surgeons' recommendations can be found in Appendix D at 258.

[4] The HEW comments on this April 20 committee print are probably those which accompanied the letter from HEW's assistant secretary, Roswell Perkins, to Senator Goldwater. Appendix P at 21-22. This letter urged Goldwater to retain the provisions in Title I unless such retention would jeopardize the passage of the bill. Additionally, Perkins provided a staff markup of suggested amendments "so as to make clear beyond doubt that the benefits of the bill could

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust, and the income therefrom shall first be applied to meet the necessary expenses of the program for the hospitalization and care of the mentally ill in Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide.

Under the HEW suggestion, Section 202(e) would have read:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any distribution thereof, shall be administered by the Territory of Alaska as a public trust, and such proceeds and income therefrom stall first be applied to meet the necessary expenses of the mental health program of Alaska, including (but not by way of limitation) the out-patient and in-patient care and treatment of the mentally ill, and of the mentally defective and mentally retarded, of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide in part.

Appendix M at 12. Committee Print No. 5, Appendix N. was printed April 26, 1956, a few days after Appendix M. Committee Print No. 5 was a draft of provisions which had been approved in principle by the Subcommittee on Territories. In comparing Committee Print No. 4 with Committee Print No. 5 it is apparent that some but not all of the changes proposed by HEW were accepted by the subcommittee. Committee Print No. 5 has

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be made available to the mentally retarded and mentally deficient,.as well as those who are in a strict sense mentally ill." Appendix P at 22.

nothing of the original Title I of the bill. Section 202(e) provided in part:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and the income therefrom shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide.

Appendix N at 9. This language was unchanged in Committee Print No. 6, Appendix O. The Goldwater amendment, as amended, was the substitute bill reported out by the committee. Appendix P at 29-34. Section 202(e) as report out was the same as it appeared in Committee Print No. 5.

The Senate Interior Committee Report, Report No. 2053, Appendix P. notes that the committee substitute is the amendment proposed originally by Senator Goldwater, "with certain clarifying changes. " Appendix P at 2. The report states:

> Under the House bill, the Territorial Legislature of Alaska could have annulled or amended any of the sections relative to commitment, hospitalization, and care at any time.
>
> However, the proposed provisions were misunderstood by many persons in parts of the country other than Alaska. Partly as the result of this misunderstanding, but more because the members of the committee are convinced that the people of Alaska are fully capable of drafting their own laws for a mental health program for Alaska, the committee concluded that authority should be vested in them in this field comparable to that of the States and other Territories.

> Hence, Senator Goldwater's amendment was adopted, the substance of which is the striking of the commitment procedures in Title I of the House bill. In so doing, the committee wishes to go on record as stating emphatically that its action is in no way a repudiation or disapproval of the provisions approved by the House of Representatives and endorsed by such a large number of qualified experts.

Appendix P at 3. With respect to the land grant of one million acres, the report notes:

> The income and proceeds from disposition of these lands must be administered as a public trust, with the expenses of the mental health program having first call on such funds. Amounts not needed for the mental health program can be used for other public purposes as the legislature may determine,

Id. The report also noted that the purpose of the grant was to "afford revenues to the Territory for support of its mental-health program." There is nothing in the committee report which expressly states what the committee meant by "the mental health program of Alaska," or who the intended beneficiaries of the public trust were.

After the House failed to concur in the Senate amendment, the matter went to conference committee. See Appendix R. The conference committee recommended that the House recede from its disagreement to the amendments of the Senate and agree to the passage of the bill with one further amendment not germane to this issue. In comparing the House and Senate versions of H.R. 6376, the House Managers stated:

> Both versions of Title II of H.R. 6376 are identical in substance but with a minor change in wording. The House-passed bill provided that the monetary returns realized from the land grants would be administered by

> the Territory of Alaska as a public trust for the hospitalization and care of the mentally ill in Alaska. The Senate-reported bill specifies that these returns shall be applied to meet the necessary expenses of the mental-health program in Alaska. The managers on the part of the House accepted this Senate amendment which broadens the use of the revenues for use of the Alaska menta1-health program rather than for the hospitalization and care of the mentally ill in Alaska.

The bill as recommended by the conference committee was finally passed and became the Alaska Mental Health Enabling Act.

The bill as enacted required the Territory to submit a plan for the approval of the Surgeon General before the Territory would receive the yearly grants-in-aid. Appendix X to the Bosel reply memorandum is the report by the Territory to the Surgeon General of May 7, 1957. From this report it is clear that at that time the "integrated mental health program for Alaska" included the mentally deficient. See pp. 7 and 10.

In 1957 the territorial legislature enacted its first "mental health program." 1957 Session Laws of Alaska, ch. 87. In that act, the territorial legislature defined "mentally ill individual" as an individual having a psychiatric or other disease or senile changes which substantially impair his mental health or who is mentally deficient," ACLA § 51-4-20a(1) (1958 Supp.).

The legislative history and historical events must also be considered in light of the perceived problem which Congress was addressing when it enacted the AMHEA, viz. the treatment of Alaskan individuals who had been adjudicated insane and placed at the Morningside Hospital in Portland. An early impetus to all of the legislation regarding Alaska commitment procedures was the Overholser Report on the Morningside Hospital in 1950. Appendix V. The report was the product of an investigating

committee designated by the Department of the Interior,[5] chaired by Dr. Wilfred Overholser. The Overholser Report noted the inadequacy of the mental health program in Alaska and called attention to the archaic commitment procedures which treated the mentally ill as "criminals" who were convicted, committed and transported in custody to Morningside. The investigating committee made several long-term recommendations, including: the construction of a modern mental hospital in Alaska to provide treatment for chronic and acute cases; and (2) creation of a 50-bed treatment center at Mt. Edgecumbe to care for acute cases from southeastern. The committee also recommended immediate changes to be accomplished through legislative action, including: (1) development of a comprehensive mental health program under territorial control serving educational purposes; (2) provision for emergency treatment and observation centers in the general hospitals in the territory; (3) revamping of legislation for commitment and voluntary admission for hospitalization: and (4) provision for territorial control of all public mental health services in Alaska.

It is also important to note that the patients from Alaska who were treated at Morningside were not just individuals suffering from chronic psychiatric illnesses. Many of those who were admitted to Morningside were mental defectives. See Appendix W at 741; Appendix X. Also included among the patients at Morningside were those suffering from alcohol psychoses and the senile. The 1957 study by the Public Health Service done at the direction of Congress after the enactment of the AMHEA found that as of March 22, 1956, of the 379 patients in the hospital, 89 were mentally retarded patients. Appendix v at 762. That survey concluded:

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[5] Before the enactment of the AMHEA, the Department of Interior was responsible for the care and treatment of persons in Alaska who were adjudicated legally insane. Thus, it was the responsibility of the Department of the Interior to supervise the hospital at which Alaskan patients were placed, Morningside"

> There is a need for construction of mental health facilities in Alaska if the Territory is to conduct an effective mental health program for its citizens. These facilities should provide for housing in-patient services, out-patient services, and preventive services for the mentally ill and the mentally retarded of all ages and for alcoholic and senile patients.

The questions presented in this portion of the litigation are difficult ones. There is support for the position taken by each of the parties. When considering all of the information available in light of the historical facts, it is the conclusion of the court that Congress intended that the Territory establish a comprehensive mental health program which would provide services to a group consisting of at least those individuals suffering from a psychiatric illness who may require hospitalization and the mentally defective and retarded.[6] Further, it is the conclusion of the court that Congress intended that the mental health lands public trust benefit the recipients of the services of the comprehensive mental health program, which group must include, at a minimum, the mentally ill who may require hospitalization, and the mentally defective and retarded. The court concludes that it is within the discretion of the State to include other groups as recipients of services by the mental health program but it is not within the discretion of the State to exclude either of those two groups.

Based on the legislative history, it is clear to the court that Congress did not intend to exclude the mentally deficient and mentally retarded as beneficiaries of mental health lands trust. First, there is no question that it was the intention of the House to include the mentally defective and retarded as beneficiaries of the trust. Further, when HEW pointed out to the Subcommittee on Territories that its bill might be interpreted as excluding the

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[6] The court does not exclude from this operative definition either chronic alcoholics suffering from psychoses or senile people who as a result of their senility suffer major mental illness.

mentally defective and retarded from the benefits of the AMHEA, the Subcommittee responded by modifying the language and adopting a portion of the language proposed by HEW. Specifically, HEW proposed the term "the mental health program of Alaska" which was ultimately adopted. Compare Appendix M Section 202(e) with Appendix N Section 202(e). What the Subcommittee failed to include was a very cumbersome "including but not limited to" interpretative phrase. Given that the term "mental health program" is the term used throughout the legislative history and testimony as the broadest term for what was proposed or anticipated, the court concludes that the Subcommittee's use of that term intended a broad-reaching definition. Moreover, the court relies on the statement in the conference committee report that the change in language from the House language in Section 202(e) to the Senate version of Section 202(e) "broadens the use of the revenues for use of the Alaska mental health program rather than for the hospitalization and care of the mentally ill in Alaska." Surely, the House managers recognized that the language of Section 202(e) as adopted by the House provided for the use of the funds to pay for the expenses of the care and hospitalization including the mentally defective and retarded. Had the Senate intended something different, the House managers would not have characterized the change as one which broadened the use of the funds. Moreover, the court is persuaded by the historical facts that Congress did not intend to exclude the mentally defective and retarded from the benefits of the Alaska Mental Health Enabling Act and its grants. First, the Public Health Service in its 1957 survey reported to Congress on the needs of the mentally defective and retarded. Second, Alaska's integrated mental health plan submitted to the Surgeon General included the treatment of the mentally defective and retarded. The plan was obviously accepted by the Surgeon General without action by the Congress. Finally, Alaska's first mental health program enacted by the territorial legislature clearly included the mentally defective; despite its authority to do so, Congress did not amend the legislature's act.

There is no question that Congress was also concerned with giving the Territory of Alaska the power to solve its own problems in the mental health field. The overall purpose of the grant of lands and the public trust established in Section 202(e) was to provide a financial basis of support for the territory's program. Thus, it is apparent as well that the Congress intended to give the Territory, now the State, discretion in the way the funds were spent. For example, the effect of the Senate' s broadened language would permit the spending of funds for out-patient care to those who would not need hospitalization and thus a new group of beneficiaries, those suffering from mental illness not requiring hospitalization, could be added by the legislature in the legitimate exercise of its power.

The legislative history does not support the State's broad view of its discretionary authority. Under the State's view, it has the power to include or exclude any group from the benefits of its mental health program. The State argues that its discretion would include the power to exclude those suffering from a traditionally recognized mental illness requiring hospitalization in appropriate circumstances. The court cannot agree that it was Congress' intent to grant such broad discretion to the State. First, it must be recalled that Congress intended the Territory to deal with the Morningside problem. Had the legislature and territorial government not dealt with the individuals who were placed at Morningside but rather had chosen a "mental health program" that merely improved the mental health. and disposition of otherwise healthy people, surely Congress would have taken action. The reason that Congress would have taken action is that its intent was not being fulfilled. Congress clearly intended that the patients at Morningside be cared for under the State's mental health program; thus, Congress intended that the funds and lands given to the Territory, now State, be used to benefit those suffering from mental illnesses requiring hospitalization and the seriously mentally defective and retarded. Second, Congress maintained federal control over the disbursement of monies by requiring approval by the Surgeon General of the proposed

mental health plan before the money would be distributed. Such provision is inconsistent with the plenary authority argued by the State in this litigation.

Where Congress has created a land trust to be administered by a state for the benefit of certain groups the state owes a duty of loyalty to the beneficiaries. See, e.g., United States v. New Mexico, 536 F. 2d 1324 (l0th Cir. 1976); County of Skamania v. Washington, 685 P.2d 576 (Wash. 1984). In the administration of this trust, the State must treat all the beneficiaries impartially. See, e.g, Brown v. McLanahan, 148 F.2d 703 (4th Cir. 1945); Estate of Toulmin v. United States, 326 F. Supp. 1028 (S.D. Ohio 1971). As a result of these duties, the State may not remove any group as a beneficiary and must provide for necessary services as "the necessary expenses" of the mental health program from the trust before it may allocate any money for a purpose other than the mental health program.

IT IS SO ORDERED.

DATED at Fairbanks, Alaska this 27th day of April, 1988.

MARY E. GREENE
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child and EARL HILLIKER on behalf of themselves and all others similarly situated,	)	FILED in the Trial Courts State of Alaska Fourth District JUN 15 1983
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

No. 4FA-82-2208 CIV

MEMORANDUM DECISION

Plaintiffs filed a complaint in late 1982 seeking a declaration that § 4, ch. 181, 182, Alaska Sess. L. 1978, is null and void. Plaintiffs allege that the legislature, by enacting A.S. 37.14.010-.050, has illegally disposed of lands ceded to the State by the United States under a mental health land grant contained in Public Law 84-830, §202 (1956).

Plaintiffs Vern T. Weiss, et al. ("Weiss et al.") have moved for partial summary judgment against the defendant State of Alaska. Weiss et al.'s motion seeks an order declaring (1) that lands granted to the state under the Alaska Mental Health Enabling Act, P.L. 83-830, 70 Stat. 709, may not be redesignated general grant lands by the Alaska Legislature and that ch. 181 and 182, Alaska Sess. L. 1789, are to that extent null and void under the Supremacy Clause, art. VI, cl. 2, of the United States constitution, and (2) that the lands therefore are subject to a

federal trust. The State has filed a cross-motion seeking to establish the statute's validity.

DISCUSSION

In State v. University of Alaska, 624 P.2d 807 (Alaska 1981) the Alaska Supreme Court discussed the law of public trusts and the powers of the state legislature with regards to land held in public trust. In the University of Alaska case the court held that lands patented to the Territory of Alaska under an Act of 1929 were held in a public trust for the exclusive use and benefit of the [now] University of Alaska.

The contested land grant to the Territory of Alaska at issue herein is one for the benefit of the mentally ill in Alaska. The original language of the grant, no longer codified, is as follows:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefore or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. Formerly 48 USC §46-3, P.L. 84-830 §202 (1956).

Since the language of the original grant clearly creates a public trust, there is no need to imply such a trust as the court did in University of Alaska, supra. Having found such a trust to exist, the question then becomes how to construe its terms.

The 1929 Act (to the University of Alaska) stated with particularity that the land being granted was to be put to the exclusive use and benefit of the University of Alaska. The court construed this language literally and held the state liable for the actual value of the land from which the beneficiary had been deprived. The court also expressly found that the legislature retained the power to dispose of the land held in trust so long as the beneficiary's account was credited with cash representing the actual value of the assets transferred. Finally, the court found that invalidation of the statute under which the legislature had acted was an improper remedy and that a more appropriate remedy would be one for an accounting.

The general policy of Congress when conveying public lands has been to restrict the use or disposition of the lands to ensure that the private sector would not take advantage of the ceded lands to the detriment of the general public. This policy was explained in Lassen v. Arizona, 385 U.S. 458, 463-464 (1967) by the United States Supreme Court:

> "All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories. Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898. The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently

> hoped to prevent such depredations here by requiring public notice and sale. The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands." (footnotes omitted). Lassen v. Arizona, supra.

The State asks this court to differentiate between the trust implicitly created in the University of Alaska case and the trust expressly created in the instant case. The State argues that the trust is not for the exclusive benefit of Alaska's mental health program because P.L. 84-830 §202(e) states in essence that all trust revenues not needed for the "necessary expenses" of the mental health program may be spent on other public projects. This court declines to construe the trust so broadly.

By so holding, this court does not purport to rule that the State of Alaska is powerless to transfer or exchange trust lands. P.L. 84-830 §202(e) specifically allows such a transfer. Rather, the trust is entitled to be reimbursed for the full value of any lands transferred from it to the "pool" of public lands envisioned in A.S. 37.14.050. "to imply a more expansive purpose for the trust than that stated in the Enabling Act is to indulge in a license of construction which Congress intended to prevent." United States v. State of New Mexico, 536 F.2d 1324, 1327 (1976).

Consistent with our Supreme Court's ruling in State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981), the invalidation of A.S. 37.14.010-050 is an improper remedy. Consequently, summary judgment is entered for plaintiffs and defendants are hereby ordered to account for the value of the lands removed from the P.L. 84-830 §202 trust.

Dated at Fairbanks, Alaska, this 14th day of June 1983.

WARREN W. TAYLOR
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child and EARL HILLIKER on behalf of themselves and all others similarly situated,	)	FILED in the Trial Courts State of Alaska Fourth District SEP 14 1983
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

No. 4FA-82-2208 CIV

JUDGMENT

For the reasons set out in this court's Memorandum Decision, dated June 14, 1983 and filed on June 15, 1983, and pursuant to the stipulation entered into by the parties and attached to this judgment and incorporated herein, this court enters the following judgment.

The Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, established a public trust for the benefit of the mentally ill in Alaska. Under the terms of that Act, the approximately one million acres of land granted to the state was dedicated for the use and benefit of the mentally ill in Alaska, the class of plaintiffs on whose behalf this action has been brought.

In ch. 181 and 182, Alaska Sess. L. 1978, the Alaska State Legislature redesignated lands obtained by the state under

the Alaska Mental Health Enabling Act as general grant lands, effectively removing them from the trust established by the federal legislation and under which the state received title to the lands. Under State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981), invalidation of ch. 181 and 182, Alaska Sess. L. 1978, is an improper remedy. Instead, the trust is entitled to be reimbursed by the State of Alaska for the fair market value of the mental health trust lands as of July 19, 1978.

Accordingly, IT IS ORDERED:

1. P.L. 84-830, 70 Stat. 709, created a public trust for which the State of Alaska is trustee.

2. Ch. 181 and 182, Alaska Sess. L. 1978, are valid and constitutional insofar as they redesignate as general grant lands the mental health trust lands received by the state under the terms of the Alaska Mental Health Enabling Acts of 1956, P.L. 84-830, 70 Stat. 709.

3. The public trust established by P.L. 84-830, 70 Stat. 709, shall recover from the defendant State of Alaska an amount equal to the fair market value of all lands conveyed from the trust as of the date of conveyance, plus prejudgment interest from the date of each conveyance. For the purposes of this judgment, all lands remaining in the trust as of July 19, 1978, shall be considered as having been removed from trust status by the State of Alaska on that date. The exact amounts shall be determined as soon as may be practicable in accordance with the stipulation of the parties.

4. In calculating the final dollar figure to be included in any final judgment, the state shall receive credit for all appropriations for mental health purposes, including interest at the same rate as is used to compute prejudgment interest from the effective date of each such appropriation. Any disagreement whether a particular appropriation should be credited shall be

determined under the procedures set out in the Uniform Arbitration Act, AS 09.43.180.

5. Pursuant to Civil Rule 54(b), this court finds that there is no just reason for delay and expressly directs the entry of judgment in the manner set forth herein.

JUDGMENT ENTERED this 14th day of September, 1984.

WARREN W. TAYLOR
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES, Plaintiffs, vs. STATE OF ALASKA, Defendant.	)	FILED in the Trial Courts State of Alaska, Fourth District DEC 14 1994

Case No. 4FA-82-2208 Civil

ORDER

On December 6, 1994, final approval was granted for the settlement contained in Chapters 5 and 6, FSSLA 1994, Chapters 1 and 2, SSSLA 1994, Chapter 66, SLA 1991, and the Settlement Agreement signed on June 10, 1994. The following sections of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA

1994, are incorporated into and material to the settlement agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, and 51. Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, is also material to the settlement agreement. In the event the Legislature materially alters any of these legislative enactments, the plaintiffs may seek relief from the judgment dismissing this case, pursuant to Alaska Civil Rule 60(b)(6), and file a new action reasserting all of their claims including their original claims and the claim that the mental health lands trust has not been adequately reconstituted. This dismissal with prejudice will not bar these claims.

Interim deeds conveying reconstituted trust lands to the Alaska Mental Health Trust Authority, created by Section 26 of Chapter 66, SLA 1994 (to be codified as AS 47.30.011(a)), were tendered by the State and accepted by the court on November 4, 1994. Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, appropriates two hundred million dollars ($200,000,000) to the mental health trust fund, which is created by Section 12 of Chapter 5, FSSLA 1994 (to be codified as AS 37.14.031).

The court has been assured that the State will promptly implement the following: (1) delivery of the interim deeds to the Alaska Mental Health Trust Authority upon its request; and (2) payment of the two hundred million dollars ($200,000,000) into the mental health trust fund on December 16, 1994, the effective date for Chapters 5 and 6, FSSLA, as amended by Chapters 1 and 2, SSSLA 1994. The court finds that with recordable conveyances of original trust land and replacement trust land and payments of cash into the trust fund along with creation of the Alaska Mental Health Trust Authority and other program improvements, as required by the Settlement Agreement and the legislation described above, the State will have satisfied its obligations to reconstitute the mental health trust under State v. Weiss, 706 P.2d 681 (Alaska 1985). Failure of the State to

complete its obligations under the settlement in a timely manner will be grounds for plaintiffs to seek relief from judgment.

Therefore, in view of the above IT IS ORDERED that

1. The preliminary injunction issued July 9, 1990 is dissolved.

2. The 1986 mineral closing order entered by this court is vacated. However, the order Temporarily Closing Trust Land to Mineral Location, dated August 15, 1994, remains in effect. All lands designated as trust land pursuant to Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994 are temporarily closed to mineral location until regulations regarding development of mental health trust mineral land are adopted and become effective pursuant to sections 9 and 17 of Chapter 5, FSSLA 1994.

3. The case of Weiss v. State, 4FA-82-2208 Civil, is DISMISSED with prejudice.

If no appeal is taken from the dismissal of this case and the December 6, 1994, decision granting final approval of thesettlement, the dismissal of this action terminates the operation of the lis pendens[1] identified in the attached Exhibit A. See Blake v. Gilbert, 702 P.2d 631, 642 (Alaska 1985), overruled on other grounds, Bibo v. Jeffrev's Restaurant, 770 P.2d 290, 296 n.9 (Alaska 1989). If final approval and dismissal are appealed, the

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[1] The recording of a notice of lis pendens provides constructive notice to purchasers and encumbrancers that their interests may be affected by a pending action affecting the title to or the right of possession of real property described in the notice. AS 09. 45. 940.

lis pendens identified in Exhibit A automatically remain in effect pending a decision on appeal. See id.; AS 09.45.940.

DATED at Fairbanks, Alaska this 13th day of December, 1994.

MARY E. GREENE
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child and EARL HILLIKER on behalf of themselves and all others similarly situated,	)	FILED in the Trial Courts State of Alaska, Fourth District SEP 5 1984
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	No. 4FA 82-2208

STIPULATION

The parties acknowledge the following:

1. Most of the major substantive issues in this case have been decided by the Memorandum Decision awarding plaintiffs a partial summary judgment. All parties desire the major substantive issues to be determined by the Alaska Supreme Court, and if necessary the United States Supreme Court, as soon as possible. The parties believe that the valuation of the former mental health trust lands will not be a major point of contention between plaintiffs and the State of Alaska.

2. In order to draft an enforceable final order in this cause, the following information will be prepared by the State of Alaska:

(a) A legal description of all lands selected by the State of Alaska under the Alaska Mental Health Enabling Act, and the current status of such lands

(i.e., whether such selections were patented, tentatively approved, or rejected);

(b) whether such lands, or interests in such lands, have been conveyed or alienated by the state, and if so, the nature and fair market value of the interests so conveyed or alienated;

(c) the fair market value of all mental health lands remaining in the trust on the date when the 1978 Act removing the lands from the trust became effective.

3. The information required in paragraph 2 above cannot reasonably be assembled until approximately March, 1985. The State of Alaska is making a good-faith effort to generate the information.

Therefore, the parties agree and stipulate as follows:

1. The parties desire that a final judgment as to less than all issues in the case be entered by the court at this time, pursuant to Civil Rule 54(b), on the issues upon which the court ruled in its Memorandum Decision dated June 14, 1983 and filed on June 15, 1983.

2. Assuming the trial court's ruling that the ch. 181 and 182, Alaska Sess. L. 1978, is valid is upheld on appeal, the value of the mental health lands shall be computed by determining the fair market value of those lands as of July 19, 1978, the effective date of the 1978 legislation, plus simple interest at 10.5 percent per year as provided in AS 09.30.070. To determine fair market value, the state shall perform the necessary appraisals. Prior to issuing any requests for proposals, selecting any appraisers, or entering into any contracts for appraisals, the state shall permit counsel for the plaintiffs to review the requests for proposals, the list of approved appraisers and the contracts (including the instructions to the appraisers included in the contracts). The appraisals shall be completed by March 15, 1985. The state shall provide to plaintiffs' counsel copies of each appraisal as it is completed, and give plaintiffs' counsel a

reasonable period of time not exceeding 60 days from the date of mailing to file any objection.

3. In addition to appraising the fair market value of former mental health lands converted to general grant land status by the 1978 legislation, the state shall develop estimates of the value of all state mental health land conveyances, leases, or material sales to third parties before July 19, 1978. These estimates shall be based on appraisals of and revenues from mental health lands performed in conjunction with the creation of those third party interests before July 19, 1978. All such estimates and the supporting papers shall be submitted to counsel for plaintiffs on or before May 15, 1985, and plaintiffs shall file any objections to the same within 60 days of mailing.

4. In calculating the final dollar figure to be included in any final judgment, the state shall receive credit for all appropriations for mental health purposes, including interest at the same rate as used for prejudgment interest from the effective date of each appropriation. Any disagreement whether a particular appropriation should be credited shall be determined under the procedures set out in the Uniform Arbitration Act, AS 09.43.180.

5. Neither party will seek an order staying proceedings under the Civil Rule 54(b) judgment entered by the superior court, or with respect to any matters addressed in this stipulation and agreement.

6. In the event of any appeal or cross-appeal of the Civil Rule 54(b) judgment entered by the court in this action, neither party will initiate proceedings to require the posting of a cost bond.

7. If the state adheres to the requirements of this stipulation and agreement, the state shall be deemed to have complied with the discovery request served on the state by the plaintiffs and the court's Order Compelling Answer to Interrogatory dated December 15, 1983 and filed December 16,

1983. It is understood that plaintiffs' rights to initiate further discovery proceedings are not prejudiced by this stipulation.

8. Motions for costs and attorney fees are reserved until a final money judgment is entered in this action.

STEPHEN C. COWPER Attorney for Plaintiffs Dated: Aug. 4, 1984	NORMAN C. GORSUCH ATTORNEY GENERAL By G. Thomas Koester Attorney for Defendant Dated: Aug. 30, 1984

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, minor child and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated, ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC and H.L., M.K. and ALASKA ADDICTION REHABILITATION SERVICES, Plaintiffs, vs. STATE OF ALASKA Defendant	FILED in the Trial Courts State of Alaska Fourth District JUN 10 1994

Case No. 4FA-82-2208 Civil

SETTLEMENT AGREEMENT
AND
STIPULATION TO TERMS OF DISMISSAL

WHEREAS, the state and the plaintiffs and plaintiff-intervenors have engaged in litigation since 1982 over numerous disputes relating to the trust established by the Alaska Mental Health Enabling Act of 1956, including litigation over proposed settlement terms incorporated in Ch. 66 SLA 1991; and

WHEREAS, third-party intervenors Alaska Center for the Environment, et al., and Marathon and UNOCAL have intervened to challenge proposed settlement terms incorporated in Ch. 66 SLA 1991; and

WHEREAS, SCS CSHB 201 (FIN)("HB 201") and SCS CSHB 371 (FIN) ("HB371") include terms proposed as a settlement to resolve this litigation which do not become effective until dismissal of this action; and

WHEREAS, the state, plaintiffs, and intervenors (collectively "parties") seek to set forth the full terms of settlement and the manner in which they intend to implement it so as to obtain judicial approval of the settlement and dismissal of this action pursuant to Alaska Civil Rule 23(e);

NOW THEREFORE, the parties, through counsel, hereby stipulate and agree to the following terms of settlement of this action.

I

BASES OF SETTLEMENT

1. Dismissal with prejudice of the plaintiffs' claims as provided in part VI of this agreement is made in consideration of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51, of HB 201, Sections 1 and 2 of HB 371, and the terms of this agreement, and form the bases of the settlement. The provisions of HB 291 and HB 371:

(a) reconstitute the trust established by the Alaska Mental Health Enabling Act of 1956 with a combination of original and substitute trust land totaling approximately 930,000 acres;

(b) provide a cash payment of $200 million dollars to be deposited into a newly created mental health trust fund which the plaintiffs consider as additional compensation for the land or interests in land not returned to trust status;

(c) establish a Trust Authority to oversee trust assets, administer the mental health trust income account, and ensure an integrated, comprehensive mental health program for the state;

(d) require the principal of the trust fund to be retained perpetually for investment, and sale proceeds, royalties, and other income from the management of trust land which is attributable to principal to be deposited into the fund;

(e) authorize the Trust Authority to spend net income of the fund and income from the management of land not otherwise attributable to principal in fulfillment of the Authority's purpose to ensure an integrated, comprehensive, mental health program; and

(f) make effective certain improvements in the state's mental health program enacted under Ch 66 SLA 1991 including the process of establishing a coordinated and comprehensive mental health program for the state of Alaska.

II

IDENTIFICATION OF LAND PROVIDING FOR TRUST RECONSTITUTEION

1. The parties agree that the land negotiated as land to be designated as mental health land pursuant to Section 40(a)(1)&(2) of HB 201 consists of approximately 930,000 acres of original and replacement trust land identified on the lists of "Original Mental Health Land To Be Designated As Trust Land, April 28, 1994" and lists of "Other State Land To Be Designated As Trust Land, April 28, 1994" attached hereto as Attachment A. This land is generally described as follows:

(a) Original Trust Land (Fee Estate):

Approximately 435,000 acres of original trust land, which include approximately 108,894 acres of unleased coal areas, approxi-

mately 119,213 acres thought to have mineral potential, approximately 48,244 acres of commercial forest resources in the Cape Yakataga area, and approximately 158,000 acres of land tracts of various sizes. Of the 435,000 acres, approximately 212 acres are subject to long term leases, approximately 36,440 acres are subject to existing mining claims, approximately 1,095 acres are derived from the unoccupied areas of state facilities, and approximately 4,634 acres will be reconveyed by municipalities. In addition to the 435,000 acres, there are more than 20,000 acres of Alaska Mental Health Enabling Act entitlements the federal government has yet to convey.

(b) Original Trust Land (Mineral Estate Only): The oil and gas interests in the mineral estate of approximately 78,566 acres within the Cook Inlet geologic basin, the surface of which has been conveyed to third parties or is within state legislatively designated areas; the mineral estate in 19,138 acres conveyed to municipalities; and the mineral estate of 35,771 acres in the Matanuska Valley Moose Range.

(c) Substitute Trust Land (Fee Estate): Approximately 4,252 acres in the Thorne Bay area selected for timber value; approximately 1,722 acres that are part of the Fort Knox mining project selected for its mineral value; approximately 65,000 acres selected for their mineral potential; and approximately 40,943 acres selected for their surface value, consisting of 1,169 acres of parcels within subdivisions and 39,774 acres of other land tracts of both small and large size.

(d) Substitute Land (Mineral Estate Only): Approximately 217,000 acres of mineral estate selected for their mineral potential near Fairbanks and Haines; and approximately 25,720 acres of oil and gas interests within the Cook Inlet geologic basin in the Kenai Peninsula and the lower Susitna Valley.

(e) The parties further agree that the reasons for selecting the lands as described in subsections (a) – (d) above are given merely to categorize and describe the lands. In so doing,

neither party makes any representations as to the revenue producing capability of any parcel of such land.

III

PROVISIONS FOR TECHNICAL CORRECTIONS TO LIST OF LANDS

1. The parties agree that any omissions, overinclusions, inconsistencies or errors now known or discovered in the lists of original and substitute trust lands transferred to the trust pursuant to Sections 40(a)(1)&(2) of HB 201 shall be resolved as follows:

(a) The State and the plaintiffs, and the State and the Trust Authority, once established, shall identify to the other party any omissions, overinclusions, inconsistencies or errors in the lists of original and substitute trust lands as soon as such problems are known or discovered, along with such information or other explanation as is necessary to determine the reason for the claimed omission or error.

(b) Any errors or omissions to the legal descriptions of the lists of original and substitute lands submitted pursuant to Sections 40(a)(1)&(2) of HB 201 necessary to accomplish the intent of the parties shall be corrected by Department of Natural Resources (DNR) pursuant to the authority granted DNR under Sec. 17 of HB 201.

(c) Any additions, deletions, or substitutions to the list of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) necessary to accomplish the intent of the parties shall be obtained by legislative amendment or by transfer, exchange, or conveyance.

(d) As of the date of executing this agreement, the parties have identified in Attachment B the initial omissions, overinclusions, or substitutions to the lists of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) which they agree to correct pursuant to the terms of (b) and (c) above.

IV

PROVISIONS REGARDING TRANSFER OF LAND TO TRUST AUTHORITY

1. Transfer of Land by Quitclaim Deed And Delivery of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Sections 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this action, the deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority to complete the preparation of recordable deeds for delivery to the Authority as soon as practicable after dismissal.

2. Authorization to Convey State Land as Substitute Land. The State warrants that it has the legal authorization necessary to convey the land or interest in land designated as mental health lands pursuant to Section 40 (a)(2) of HB 201. To the extent that such authorization is subject to a pending conveyance or patent from the federal government, and such conveyance or patent is different than that set forth in Section 40(a)(2) of HB 201, the State shall compensate the trust for the difference with other land (or interests in land) of similar type or character and equal value and similar revenue producing potential, unless otherwise agreed by the Authority and DNR.

3. Encumbrances. Land conveyed to the trust pursuant to Sections 40(a)(1)&(2) of HB 201 remains subject to valid existing encumbrances or valid existing interests as provided in Section 40(b) of HB 201. The Authority may challenge the valid-

ity of any encumbrance or interest. The Authority shall be bound by and be able to enforce the terms of valid encumbrances and valid interests.

4. Hazardous Substances. (a) If it is discovered that any hazardous substance or substances came to be located on or discharged from a parcel of land conveyed to the Trust Authority under Sections 40(a)(1)&(2) of HB 201 such that the affected parcel is not in compliance with any federal, state, or local environmental laws, the issue shall be resolved as provided in this section.

(b) If the hazardous substance came to be located on or discharged from a parcel of original mental health trust land after being conveyed to the state under the Enabling Act but prior to conveyance to the Trust Authority, or on a parcel of replacement land at any time prior to conveyance to the Trust Authority, the issue shall be resolved in such manner as the Trust Authority and DNR mutually agree. If the Trust Authority and DNR cannot reach agreement, the Trust Authority in its discretion may elect to retain the affected parcel as trust land or tender it back to DNR. If the Trust Authority tenders an affected parcel to DNR, the sole remedy is that DNR in its discretion shall either cause such affected parcel to be remediated to comply with such environmental law or laws or exchange the affected parcel for other land (or interests in land) of equal value and similar revenue-producing potential valuing and determining the revenue producing potential of the affected parcel without the hazardous substance. If such a replacement exchange occurs, the Trust Authority shall reconvey the affected parcel to the state. If the Trust Authority tenders an affected parcel to DNR under this subsection, the state shall, at its expense, appear for, defend, and hold harmless the Trust Authority from any claim or action asserted by a third party based on the presence of any hazardous substance located on the affected parcel prior to its remediation or the replacement exchange of such land.

(c) If the hazardous substance came to be located on or discharged from a parcel of original mental health trust land

before being conveyed to the state under the Enabling act, or for both original mental health trust land and substitute land, after conveyance to the Trust Authority under Sections 40(a)(1)&(2) of HB 201, responsibility shall be allocated between the Trust Authority and the state as provided by applicable law.

(d) Nothing in this section is intended to limit the Trust Authority's or the state's rights to assert any claims or defenses available to them with respect to third parties.

5. Conveyances Recorded at State Expense. All conveyances, releases of interest, cancellation of lis pendens, or other documents required by the terms of this agreement shall be recorded at the state's expense in the recording district in which the land is located.

6. Land Closed to Mineral Entry. All parties to this agreement shall jointly move the court to continue the mineral closing order on original trust land and extend such order to substitute land, such order or orders to be effective until the regulations required by HB 201 become effective. Any interest claimed or granted in contravention of such an order or orders are void.

7. Access to Trust Land. The State has reserved or will reserve legal rights-of-way and easements for access and for utility services to trust land. The rights-of-way and easements shall be consistent with state and federal law, and shall be located to assure adequate and feasible access for the purposes for which the right-of-way or easement is intended. Costs associated with maintaining easements and rights-of-way will be addressed in the regulations promulgated under HB 201. Nothing in this section requires the state to provide access across non-state land.

8. Competing Native Allotments. In the event original mental health land to be returned to the trust under Section 40(a)(1) of HB 201 is conveyed to the BLM by the State because of a valid Native Allotment, DNR will convey to the Authority the land conveyed to the state by the federal government under the Enabling Act to replace the land subject to the Native allot-

ment, consistent with the annual priority list filed with the BLM by DNR.

9. Conveyances of Remaining Mental Health Land Selections. The Trust Authority will prioritize remaining mental health selections and provide this listing to DNR for incorporation in the annual conveyance priority list filed with the Bureau of Land Management. DNR will consult with the Authority when it determines the appropriate ranking of the mental health selections among other state conveyance priorities. DNR shall assist the Authority in its efforts to ensure that annual conveyance priorities are completed in a timely manner by BLM.

V

TRUST FUND AND TRUST AUTHORITY

1. Trust Authority as Fiduciary. In exercising its powers, duties and responsibilities as trustee the Trust Authority is under a fiduciary obligation as set forth in AS 37.14.007 and 37.14.009, and may employ consultants, accountants, attorneys and staff in the exercise of its responsibilities. The Authority shall annually review the allocation of proceeds, income or other money received from the management of trust land to assure proper attribution to principal and shall annually report on the management of trust assets and the development of a comprehensive mental health program for the State.

2. Trust to Receive Gifts. The parties' intent in establishing the mental health trust fund and mental health trust income accounts under Sections 12, 15 & 16 of HB 201 is that the trust may receive and the trust income account may be properly used by the Authority for soliciting gifts, bequests and contributions for a purpose consistent with the funding of an integrated comprehensive mental health program for the State.

3. Records to be Available to Authority. The records, surveys, reports and other data regarding trust land and proposed substitute land accumulated by the plaintiffs' Mental

Health Lands Project are the property of the state and shall be available for inspection by the Authority at all times, consistent with applicable law. The records, surveys, reports and other data of DNR regarding management of trust land shall be available for inspection by the Authority at all times, consistent with applicable law. Unless otherwise agreed by the Authority and DNR, all of the records discussed herein shall be located in the unit established to manage trust land pursuant to Section 22 of HB 201.

4. Administration of Trust Income. The transfer of the net income of the fund to the income account by the Permanent Fund Corporation is not discretionary and is required by HB 201. Similarly, the allocations and transfer of income from trust land to the trust fund and income account by DNR is not discretionary and is also required by HB 201. Except for the administrative expenses of the Authority subject to the Executive Budget Act under Section 16 of HB 201, and to the fullest extent consistent with the Alaska Constitution, the Trust Authority may use the money in the income account for the purposes authorized in Section 16 of HB 201 without, and free of further legislative appropriation. The Trust Authority shall use the money in the income account in fulfillment of the Authority's purpose to ensure an integrated, comprehensive mental health program for the State.

5. Income and Proceeds Account. It is the intent of the parties that the money deposited in the mental health trust income and proceeds account prior to December 15 will be deposited in either the mental health trust fund or the mental health trust income account as appropriate. To the extent possible, the state will undertake this allocation administratively. If legislation is required to accomplish this result, the parties agree to use their best efforts to seek and obtain passage of such legislation.

5. Development of Contracts, Operational Procedures and Regulations. The Authority and DNR shall negotiate in good faith and shall contract for the management of trust assets upon terms that are mutually agreeable to the Authority and DNR, and which reflect the duties and responsibilities imposed on the Authority and DNR pursuant to HB 201. The parties rec-

ognize that the details of contracting procedure, management of trust land, and other operational policies are left to be resolved under HB 201 by the Authority, DNR and other entities through a cooperative and public rulemaking process. The parties' understanding and intent on how this process will work is set forth in Attachments C and D, which the parties acknowledge are not contractual but are expressions of intent and interpretation only. To facilitate the development of a management unit, and policies and procedures reflecting the intent of the parties in entering into this agreement prior to the effective operation of the Authority, DNR agrees to consult with a transition team of representatives from the beneficiary community to advise and deliberate with DNR and other affected state agencies.

VI

SETTLEMENT, DISMISSAL AND MODIFICATION

1. Seeking Approval of Settlement. The parties agree to expeditiously file any motions, memoranda, proposed orders or other papers and to participate in any hearings necessary or convenient to obtaining preliminary and final approval from the superior court of the settlement embodied in HB 201, HB 371 and this agreement.

2. Construction. All parties have participated in drafting this agreement and agree that any canon of construction construing ambiguities against the drafter does not apply.

3. Severability. If any provision of this agreement, or any settlement provision in HB 201 or HB 371, is declared invalid for any reason, such a finding does not affect the validity of other provisions herein.

4. Attorney Fees. Attorney fees and costs shall be awarded and paid as determined by the court. Paragraph 6(e) requires dismissal of appeals to the Supreme Court because they are moot. The parties request that attorney fees be awarded as if the orders had not been appealed.

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, and acknowledge that the trust is reconstituted in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985). The provisions of Sections 2 through 9, 12 through 40 (a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and acknowledged that the trust is reconstituted. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims. In light of the dismissal of each parties' claims, no modification of this agreement may be made except in writing signed by all the parties. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

6. Settlement and Dismissal. Upon final approval of the settlement embodied in HB 201, HB 371 and this agreement by the court pursuant to Alaska Civil Rule 23, within the time frame set forth in HB 201 and HB 371 for the settlement provisions to become effective, the parties stipulate and agree to the entry of an order or orders:

(a) Approving the terms of this agreement and the settlement provisions of HB 201 and HB 371;

(b) Dismissing Weiss et al. v. State, 4FA-82-2208 Civil;

(c) Dismissing with prejudice all class claims, including without limitation those of plaintiffs and plaintiff-intervenors, known or unknown, asserted or unasserted, that arise on or before the date of dismissal and arise from or relate to the 1978 redesignation legislation, any other actions taken by the state since statehood in managing and administering the land granted to the state under the Mental Health Enabling Act or the proceeds generated from that land, or any other actions taken by

the state since statehood in managing and administering the trust created by the Alaska Mental Health Enabling Act;

(d) Requiring plaintiffs to dismiss with prejudice all other claims asserted by them, whether in the form of intervention, consolidation, appeals, cross-appeals, or amicus, in all other pending litigation, arising out of the state's administration of the trust established by the Enabling Act since statehood including Richards v. State, 4FA-93-2195 Civ.; Kashwitna Farms, Harry and Consuelo Wassink v. State and Hawkins v. Wassink, 3AN-88-0056 Civ. consolidated; Snowcrest Farms, Ray Hendershot and Royce Johnson, Falcon Lake Dairy, Elvin and Dorothy Johnson, Kashwitna Farms, Harry and Consuelo Wassink, v. State, Department of Natural Resources, Supreme Court S-6042; James White v. Commissioner, Alaska Department of Natural Resources, 3AN-93-5470 Civ.; Vern T. Weiss et al. v. Usibelli Coal Mine Inc. and State of Alaska, Supreme Court No. S-6125; Appeal of Vern T. Weiss et al., IBLA No. 91-224 (Tyonek); Vern T. Weiss et al. v. Secretary of the Interior of the United States of America, Tyonek Native Corporation, and Cook Inlet Region, Inc., A94-072 Civ. (D. Alaska);

(e) Approving this stipulation of plaintiffs, state and third-party intervenors Marathon and UNOCAL, and Alaska Center for the Environment, et al., to move for the dismissal, as moot, all pending appeals and cross appeals arising out of this action.

(f) Dissolving the preliminary injunction issued in this action on July 9, 1990; and

(g) Expunging the Renotice of Lis Pendens.

(h) The orders requiring dismissal of plaintiffs claims in subsections (b) through (g) above shall only be entered upon a finding that conveyances of land and payments of cash required by HB 201 and HB 371 have or will be made to the satisfaction of the court.

7. Relief from Judgment. By their terms, the settlement provisions in HB 201 and HB 371 do not become effective unless this action is first finally and timely dismissed, with any appeals timely resolved in favor of dismissal. If the court gives final approval of the settlement embodied in HB 201, HB 371 and this agreement, and enters the order or orders dismissing this action (as set forth in paragraph 65 (a)-(g) above) and if, thereafter, the timeliness requirements of HB 201 and HB 371 are not met, such that their settlement provisions do not become effective, any party may seek relief from such order or orders pursuant to Alaska Civil Rule 60(b)(6). The failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment and no party shall oppose such a motion.

DATED this ____ day of June, 1994, at Anchorage, Alaska.

LAW OFFICES OF
DAVID T. WALKER
Attorney for Plaintiffs
Vern Weiss and Earl Hilliker

Unsigned

LAW OFFICES OF
JAMES B. GOTTSTEIN
Attorney for Plaintiff/Intervenors
Alaska Mental Health Association
and Mary Nanuwak

Unsigned

RICE, VOLLAND AND GLEASON,P.C.
Attorneys for Plaintiff/Intervenors
H.L., M.K., and AARS

By Philip Volland June 10, 1994

ADVOCACY SERVICES OF ALASKA
Attorney for Plaintiff/Intervenors
Bosel, Doulin, Goodwin, Mayoc

By Jeffrey L. Jessee June 10, 1994

SIERRA CLUB LEGAL DEFENSE
FUND INC.
Attorneys for Alaska Center for the
Environment, et al.

Unsigned

BURR, PEASE & KURTZ
Attorneys for Marathon & UNOCAL

Unsigned

LAW OFFICES OF
DAVIS & GOERIG, P.C.
Attorneys for Alzheimer's Assoc.

Unsigned

BRUCE M. BOTELHO
Attorney General
State of Alaska

By Nathaniel B. Atwood June 10, 1994

ATTACHMENT C
TO THE
SETTLEMENT AGREEMENT
AND
STIPULATION TO TERMS OF DISMISSAL

LAW OFFICES OF
RICE, VOLLAND AND GLEASON
A PROFESSIONAL CORPORATION

Wilson A. Rice
Philip R. Volland
Sharon L. Gleason
R. Scott Taylor

211 H Street
Anchorage, Ak 99501
(907) 276-5231
Fax (907) 278-6328

May 27, 1994

Via Fax to 277-8235
Julian L. Mason
Ashburn & Mason
1130 W. 6th Avenue, Suite 100
Anchorage, Alaska 99501

Re: Weiss v. State

Dear Julian:

Certain questions have arisen among beneficiaries which center on the functions and responsibilities of the Authority. Although you and I, and Mark Davis and Dick Thwaites have discussed these, it would be helpful if the state would respond to these questions so that beneficiaries can evaluate the proposed settlement.

1. What will be the nature of the contractual relationship between DNR and the Authority? We have assumed

from the scheme of the legislation that the Authority will use a Reimbursable Services Agreement (RSA) to pay DNR's management costs from the trust income account. Is the Authority obligated to contract with DNR if it proposes fees and overhead which are not reasonable? Also, what remedy does the Authority have if it discovers that DNR fees or expenses are unreasonable? What is the process of enactment of regulations? Can the Authority itself propose regulations for DNR to consider? What are DNR's responsibilities when it "consults" with the Authority? Can DNR simply ignore the Authority's view of proper management of trust land? Can DNR propound regulations under the terms of HB 201 which are not supported by the Trust Authority?

2. What is the state's view of the contractual relationship between the Authority and the Permanent Fund Corporation (PFC)? We have also assumed that the costs of PFC management will be paid from the trust income account by the Authority through an RSA. Can the Authority require the PFC (Through its RSA, for example) to establish a special position dedicated to management of the trust fund who would report directly to the Authority? Is the Authority obligated to contract with the PFC if management fees are not reasonable in light of trust management fees in the private sector? If there is a showing that PFC fees are substantially above those in the private sector, does the Authority have the options of revising or terminating the contract? Can the Authority terminate a contract with the PFC if the Permanent Fund ceases to be a purely investment-oriented fund and adopts investment goals that are no longer compatible with trust management (e.g., high risk, speculative ventures that might nonetheless be seen as fuel for Alaska's economy)? Is it anticipated that the funds held by the PFC for the Authority will be commingled with other investments in the Permanent Fund? If this occurs, how can proper accounting be assured.

3. Will the Authority be able to review DNR and PFC records to assure that there has been proper attribution between income and principal? If the Authority were to discover improper attribution between income and principal, what reme-

dies are available to the Authority? Does the state concur that the Authority might employ its own independent counsel to remedy such a situation?

4. Will the Authority be able to request from DNR and the PFC annual reports on the management of trust assets which can be given to beneficiaries, the legislature, and the governor to assure proper trust management? We presume such records would be public documents. Does the state concur with this?

5. Will the state defend, without charge to the Trust Authority unless otherwise agreed, challenges to DNR's rule-making, and legal costs associated with trust ownership and with DNR land management?

6. Does the state agree that the land records generated by the plaintiffs' Mental Health Lands Project are properly the records of the Authority which can be used to assist proper land management decisions?

7. Does the state agree that the intent of Sec. 15 of SCHB 201 is to allow the trust fund to solicit gifts and bequests for a purpose "consistent with the funding of an integrated comprehensive mental health program"? As you may recall from Dick Thwaites' comments, this clarification makes it clear that the trust fund can be viewed as a "special needs trust" to which bequests can be made which allow beneficiaries to receive greater Medicaid benefits.

8. Is the state willing to propose a timetable for the nomination of Authority board members, selection of the DNR trust management unit, and promulgation of regulations, assuming approval of the settlement?

9. We also believe that the Authority is empowered, through its chief executive officer, to hire its own employees and consultants (see, AS 47.30.026 as enacted by Sec. 26 of Ch. 66 SLA 1991). Does the state concur that the size and composition

of the Authority's staff is up to the Board of the Authority acting through its chief executive officer?

I believe that some of these questions can properly be addressed in a settlement agreement. Although I hoped to finish a draft of an agreement by today, I thought it would facilitate completion of the agreement to await the state's response to this letter. I hope the state's response can be given next week since it will assist greatly in the ability of beneficiary representatives to assess the proposed settlement.

Sincerely,

RICE, VOLLAND and GLEASON P.C.

By: Philip R. Volland

ATTACHMENT D
TO THE
SETTLEMENT AGREEMENT AND STIPULATION TO
TERMS OF DISMISSAL

ASHBURN AND MASON
Lawyers
A Professional Corporation
1130 West Sixth Avenue, Suite 100
Anchorage, Alaska 99501

June 3, 1994

Philip R. Volland, Esq.
Rice, Volland & Gleason
211 H Street
Anchorage, Alaska 99501

Re: Mental Health Lands

Dear Philip:

Commissioner Noah and Attorney General Botelho authorized me to respond to the questions in your letter dated May 27, 1994. Our intent is to tell you how we are preparing to interpret and administer HB 201. We are assuming that all of its provisions will become effective. We begin by outlining the conceptual approach that we are taking.

DNR's overall management principle is that it does not plan to take action concerning trust land without consultation with the Authority. While DNR is charged by statute with management responsibility and must exercise its independent judgment, it will make every reasonable attempt to obtain prior approval of the

Authority before action is taken. DNR will view the Authority as a client agency and will develop a working relationship which permits quick decisions by the Authority on routine matters and provides for appropriate deliberation on more complex questions.

This is consistent with our view that the settlement of this case will mark a dramatic change from the current adversarial relationship between the mental health community and the State. We have no intention of dealing with the Trust Authority with a litigation mentality. It is in all of our interests to approach the settlement as establishing a cooperative relationship between the State and the mental health community represented by a new state agency, the Trust Authority. While there are sometimes disputes between other state agencies, some of which have the power to sue and be sued, these disputes are almost always resolved without litigation. We anticipate the same will be true with the Trust Authority's relationship to the rest of state government. It is with that expectation and in that spirit that we answer your questions.

1. Nature of Contractual Relationship Between DNR and the Trust Authority.

A. Contract. The Authority is obligated by HB 201 to contract with DNR, but we do not believe that DNR can compel terms which are unreasonable. We agree with you that using an RSA or a substantially similar arrangement is appropriate.

DNR envisions a system in which each year the department will prepare a specific work plan outlining the tasks which will be undertaken in the coming year. A cost proposal will accompany the work program. DNR and the Authority will then work together to agree on the scope of work and the resulting cost. To the extent agreement cannot be reached, there are two opportunities to resolve the matter: (1) OMB makes up the governor's budget for submission to the legislature; and (2) the legislature enacts the State's budget, which includes both the Authority's and DNR's authorizations to pay administrative costs. Both provide an opportunity for the Authority to advocate its view of

what would be appropriate staffing and costs for DNR's management services.

There is no need for a remedy with respect to the "reasonableness" of the costs and fees agreed to in an RSA because the RSA forms the basis for that year's budget, staffing pattern, etc. A prior year's experience as to "reasonableness," however, will certainly play a role in determining the terms of the next year's RSA.

As to specific expenses, there is no obligation to pay for services not delivered or for expenses that exceed the scope of the RSA. If the Authority wants more or less work, DNR will comply. The normal practice with RSAs is that disputes are prevented by providing for prior approval of unusual or potentially arguable expenses (travel, etc.). If disputes do arise, they normally are negotiated between the two agencies involved. Litigation, of course, is a potential ultimate remedy, but it is very unlikely as the nature of RSAs and the associated reporting requirements minimize the potential for disputes and the dollar amounts that might be the subject of such disputes.

B. Regulations. In theory, DNR could propound regulations not supported by the Authority, but that would be confrontational and disputatious, and is not DNR's plan. DNR intends to work closely with the Trust Authority to develop the regulations. The regulations, of course, must in any event be consistent with the State's obligations under the Enabling Act.

C. Management. "Consult" means to seek the advice of and to deliberate with the Authority, and DNR intends to do those things in good faith. DNR cannot simply ignore the Authority's view of proper trust management. The best interest finding requirement of AS 38.05/035 will apply to management of trust land, a part of which will include addressing how the proposed action is consistent with the trust principles of the Enabling Act. The Authority's views will be discussed and taken into account as part of the finding. While DNR must ultimately

exercise its independent judgment about management (just as a private trustee must exercise his or her best judgment despite the beneficiary's contrary views), DNR has no intention of ignoring the Authority's views.

2. The Authority and the Permanent Fund Corporation.

The Permanent Fund is a large, highly diversified trust fund managed conservatively. AS 37.13.300(b)(5) provides for the PFC to transfer to the Authority the "net income" attributable to the trust fund. The pro rata administrative cost attributable to the trust fund will already have been taken into account when the net income is transferred to the Authority, and the cost of management need not be addressed in the contract unless the Authority wants to pay the PFC to provide additional services. The PFC has informed us, however, that it does not contemplate contracting to provide services in addition to those required by the statute.

We do not believe that the PFC can compel the Authority to contract with it on unreasonable terms. We note, however, that for 1993, the Permanent Fund had average assets of approximately $14.8 billion and total expenses of approximately $14.9 million, for an expense ratio of only 0.10 percent.

Your question about termination of the contract with the PFC incorrectly assumes that the PFC may unilaterally change the fund's long-range investment policy. This is not correct. Legislation changing the statutes governing the utilization of the Permanent Fund would be required and, to the extent that would conflict with the State's trust obligation under the Enabling Act, would no doubt include removal of the trust fund from management by the PFC. In addition, HB 201 requires that the PFC consult with the Authority before the PFC changes its long-range investment policy. AS 37.13.300(b)(4). We view the problem suggested by this question as remote.

3. Attribution Between Income and Principal - DNR and PFC Records Review.

The Authority will be able to review DNR records and, we assume, PFC records for proper attribution of principal and income. That issue, however, is really an administrative adjustment to determine where trust account money should go - the trust fund or the income account. In either case, the money belongs to the trust. The practice in other contexts (e.g., the North Slope Borough/NPRA fund case) is that improper allocations are simply accounted for by subsequent adjustments to allocations as new income comes in. The Authority could employ independent counsel to remedy the situation, but that would not be necessary unless there were a fundamental disagreement about the governing law.

4. Annual Reports.

DNR envisions that it will give the Authority an annual report on management of trust assets which can be a public record subject to one caveat. Some types of land data (e.g., geologic data developed by third parties) are confidential by law. Various attorney general opinions establish the parameters for sharing such information with state agencies requiring access to the information. We believe, based on those attorney general opinions and Judge Greene's earlier decision, that the Authority would be an agency entitled to that information. If the Authority wants to make DNR's report public, it should be structured not to disclose statutorily confidential data.

The PFC contemplates providing monthly financial reports to the Authority and an audited annual report, similar to what it currently prepares for the Science and Technology Foundation, which is more than what is required under AS 37.13.300(b)(2) and (3).

5. Defense Costs.

There are too many variables to give a simple "yes" or "no" answer. In the absence of specific provisions in an RSA

with DNR, however, we envision that general trust law principles would apply: If the costs are properly attributable to trust management, the trust pays; if not, the State pays.

Land Records.

We agree that the records are State records which can be used to assist in making proper land management decisions. Because we do not have the records, we cannot comment on their accuracy or the extent of their usefulness. The records will be fully available to the Authority, but our belief is that they should be maintained by the DNR trust unit.

6. Solicitation of Gifts and Bequests.

Yes.

7. Timetable for Authority Board Member Nominations, etc.

Yes. DNR has started setting up the trust unit and is beginning to develop the 1995 work program as described in answer No. 1.

8. Hiring of Staff by Authority.

Yes, but subject to gubernatorial and legislative oversight through application of the Executive Budget Act to the Authority's administrative expenses. The potential for trust income to be expended primarily on a large bureaucracy was a major concern of Senators Rieger and Kelly, and that oversight was the "price" of their support for the bill.

I believe these answers respond fully and fairly to your questions,, but we will be happy to elaborate if questions remain.

Very truly yours,

ASHBURN & MASON

By: Julian L. Mason

Appendix J
Pertinent Portions of Alaska Statutes (AS)

AS 38.05.801 Management of Mental Health Trust Land.

(a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).

(b) Subject to (a) of this section, the department

(1) shall manage mental health trust land under those provisions of law applicable to other state land;

Section 41, Chapter 5 First Special Session Laws (FSSLA) of Alaska, 1994.

* Sec. 41. CONFIRMATION AND RATIFICATION OF CONVERSION OF CERTAIN ORIGINAL MENTAL HEALTH LAND TO GENERAL GRANT LAND, CONTINGENT CONVERSION OF CERTAIN ORIGINAL MENTAL HEALTH LAND TO GENERAL GRANT LAND, AND CONFIRMATION AND RATIFICATION OF ACTIONS TAKEN WITH RESPECT TO CONVERTED LAND.

(a) Except for the land described in sec. 40 of this Act,

(1) the conversion to general grant land by sec. 3(a), ch. 181, SLA 1978, and sec. 1(a), ch. 182, SLA 1978, of all land obtained by the state under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956), and not listed in "Original Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994," located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska, is confirmed and ratified; and

(2) land patented to or approved for patent to the state under the Alaska Mental Health Enabling Act after July 1, 1978, and not listed in "Original Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994," located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska, is redesignated as general grant land if it was not converted to general grant land by sec. 3(a), ch. 181, SLA 1978, and sec. 1(a), ch. 182, SLA 1978.

(b) The land affected by this section includes the land listed in "Original Mental Health Land Not To Be Returned to Mental Health Trust Status, April 28, 1994," located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

(c) All dispositions and uses of the land identified under (a) of this section, including without limitation the creation by the state or the transfer by the state of an interest in the land or the designation of the land as part of a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range are confirmed and ratified.

Supreme Court, U.S.
FILED
SEP 29 1997
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No. 97-186

In The

Supreme Court of the United States

October Term, 1996

VERN T. WEISS, *et al.*,

Petitioners,

v.

STATE OF ALASKA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PHILIP R. VOLLAND
RICE, VOLLAND & TAYLOR, P.C.
211 H Street
Anchorage, AK 99501
(907) 276-5231

Counsel of Record
for Respondents H.L., M.K. and Alaska Addiction Rehabilitation Services

JAMES H. PARKER
DISABILITY LAW CENTER OF ALASKA
615 E. 82nd Ave, Suite 101
Anchorage, AK 99518-3158
(907) 344-1002

Counsel of Record
for Respondents Bosel, Doulin, Goodwin and Mayoc

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTIONS PRESENTED

1. Does state court approval of a settlement of claims arising out of a federally created trust implicate any federal rights of class members when no adjudication of federal law occurs during the approval process?

2. May dissenting class members claim a violation of due process rights with regard to state court decisions issuing relief which they themselves requested?

LIST OF PARTIES

Petitioners are Vern T. Weiss, father and next friend of Carl Weiss, and Mary Nanuwak.

Respondents in this Opposition to Petition for Writ of *Certiorari* are H.L., M.K., and Alaska Addiction Rehabilitation Services; and Anita Bosel, Frances Doulin, Sharon Goodwin and Gabriel Mayoc.

Other parties to the proceeding are the State of Alaska; and third party intervenors in the case below: Alaska Center for the Environment; Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited; Marathon Oil Company and Union Oil Company of California; Usibelli Coal Company; Idemitsu Alaska, Inc.; and John Morris.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

Respondents H.L., M.K., and Alaska Addiction Rehabilitation Services, as well as Respondents Anita Bosel, Frances Doulin, Sharon Goodwin, and Gabriel Mayoc respectfully oppose Petitioners' request for a Writ of *Certiorari*.

OPINIONS BELOW

Weiss v. State of Alaska, 939 P.2d 380 (Alaska 1997)

State of Alaska v. Weiss, 706 P.2d 681 (Alaska 1985)

Weiss v. State of Alaska, No. 4FA-82-2208 Civil (Alaska Superior Ct. Dec. 6, 1994) (order granting final settlement approval)

Weiss v. State of Alaska, No. 4FA-82-2208 Civil (Alaska Superior Ct. July 29, 1994) (order granting preliminary settlement approval)

Weiss v. State of Alaska, No. 4FA-82-2208 Civil (Alaska Superior Ct. April 27, 1988) (order defining beneficiary class)

JURISDICTION

This Court lacks jurisdiction to hear this case as it is a request for review of a twelve-year-old state court decision and the Petition for Writ of *Certiorari* is therefore untimely filed. S. Ct. Rule 13(2); 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate and incomplete. Petitioners frequently assert as fact allegations raised in pleadings or self-serving statements made by Petitioners' counsel.[1] Notwithstanding Respondents' obligation to correct these misstatements, an accurate presentation of the complex prior proceedings here is secondary to presenting the clear lack of merit to Petitioners' arguments for *certiorari*. Accordingly, Respondents rely on and incorporate the more accurate and complete statement of the case recited by the trial court below. *See Weiss v. State of Alaska*, No. 4FA-82-2208 Civil (Alaska Superior Court, December 6, 1994); Petition for Writ of *Certiorari*, App. at C 5-29.

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[1] For example, Petitioners characterize the holding in *Weiss v. State of Alaska*, 706 P.2d 681 (Alaska 1985) (hereinafter, *Weiss I*); Petition, App. B, as authorizing the state to "dispose of Trust assets contrary to the best interests of the beneficiaries and owe nothing because it had otherwise funded a mental health program. . . . " Petition at 14. However, no such holding is made. *See Weiss I*, 706 P.2d at 684; Petition, App. B 7-8. Petitioners further state that Respondents were motivated to intervene in the case below because they anticipated "a huge income stream. . . . " Petition at 8. This statement is not supported in the record. Petitioners also describe the settlement below as a "take it or leave it" settlement arising out of "cram down" legislation, citing only to the self-serving affidavits of Petitioners' counsel. The combination of hyperbole and inaccuracy throughout the Petition only misleads the reader.

REASONS FOR DENYING THE WRIT

Petitioners urge the Court to grant *certiorari* because the Alaska Supreme Court violated federal law in approving a settlement arising out of the Alaska Mental Health Enabling Act (hereinafter AMHEA or Enabling Act) and because the settlement approval process failed to protect Petitioners' due process rights. However, Petitioners fail to raise any substantive federal issue for the Court's review. Petitioners further rely on the misleading contention that federal rights were "adjudicated" by the Alaska Supreme Court. *See* Petition at 18. However, no such adjudication occurred in the state court. To the extent that federal issues were at all implicated by the proceedings below, Petitioners have waived any right to seek review. In short, this is a complex and fact specific case with application only to the State of Alaska and which presents no unique or compelling reasons for the Court to grant *certiorari*.

1. The Court Lacks Jurisdiction To Grant Petitioners' Writ

The judgment of the Alaska Supreme Court for which Petitioners seek review, *Weiss v. State of Alaska*, 939 P.2d 380 (Alaska 1997) (hereinafter, *Weiss II*); Petition, App. A, affirmed a trial court's approval of a class action settlement. In this decision, no federal rights were "adjudicated" as Petitioners allege.[2] Rather, the Alaska Supreme

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[2] This is evident from the state supreme court's decision in *Weiss II*. *See Weiss II*, 939 P.2d at 387 n.10 ("In addition, neither the superior court in considering the settlement nor this Court

Court reviewed whether the trial court properly applied the principles of ALASKA R. CIV. P. 23(e)[3] in approving the settlement. *See* Petition, App. at A 12-13.

Each of Petitioners' claimed violations of "federal rights" regarding trust property – *e.g.*, the diminution of the trust's *corpus*; the incorporation of the state's "set-off"; the disallowance of recovery of certain lands – arise from a 1985 Alaska Supreme Court decision. *See Weiss I*, 706 P.2d at 684; Petition, App. at B 8. Specifically, Petitioners' claims largely rest on *Weiss I*'s recognition that if the state were required to reconstitute the AMHEA trust by making cash payments, it may be entitled to a set-off for monies it had already spent on mental health programs. Petitioners concede this by asserting that the unfairness of the settlement approved in *Weiss II* arises from the set-off recognized in *Weiss I*. *See* Petition at 19.

Though in obvious disagreement with this decision now – twelve years after the state court entered its final order – Petitioners never previously sought review to this Court on these matters. Even though *Weiss I* resulted in a remand to reconstitute the AMHEA trust, at that point, the "federal issue was conclusive" and "the outcome of further proceedings preordained", requiring a timely petition to this Court pursuant to 28 U.S.C. § 1257. *Asarco*

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in reviewing it 'decide the merits of the case or resolve unsettled legal questions.' "), *quoting Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Petition, App. at A 14, n.10.

[3] ALASKA R. CIV. P. 23 is identical to its federal counterpart. Both the Alaska Supreme court and the trial court evaluated the settlement considering factors drawn from federal precedent. *See* Petition, App. at A 13-14; C 37-39.

Inc v. Kadish, 490 U.S. 605, 612 (1989); *see also Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 479 (1975). The petition for *certiorari* is therefore untimely and this Court lacks jurisdiction to hear it. S. Ct. R. 13(2); *see also* 28 U.S.C. § 2101(c).

2. Petitioners Fail to Raise Substantial Issues of Federal Law

Respondents do not dispute that federal law is implicated in this case. However, to the extent that the Alaska Supreme Court's approval of the settlement in *Weiss II* involves issues arising under the AMHEA, these issues are neither substantial nor compelling questions of federal law. Rather, the federal issues are limited to the Alaska Supreme Court's interpretation of a clearly written federal statute which delegates the determination of proper trust management to the state legislature. *See Weiss II*, 939 P.2d at 392; Petition, App. A 26. Moreover, these issues are attenuated to the primary issue below, *i.e.*, review of a trial court's approval of a negotiated settlement. Petitioners have cited no federal law – case or statute – with which *Weiss II* is in conflict. Indeed, it is not clear what body of law Petitioners seek the Court to apply here. All of this evidences the lack of *any* substantial federal question presented by this case.

Petitioners rely on *Asarco* as justification for granting the writ. *See* Petition at 18. However, any reliance on *Asarco* as evidence of a compelling federal interest in state management of the AMHEA is misguided. The Court's grant of *certiorari* in *Asarco* was not, as Petitioners imply, to protect some general and significant federal interest in

trust land management. Rather, it was to review and refine federal standing and Article III doctrine. *See Asarco*, 490 U.S. at 605-25. The Court reached *Asarco*'s merits not to right an unrecognized or unjust breach of a federal trust, as Petitioners would have the Court believe, but to avoid procedural complications stemming from the jurisdictional analyses which otherwise predominated that decision.

To the extent the Court noted its concern for the trust in *Asarco* at all, it was limited to the specific trust at issue. Herein lies the flaw in Petitioners' argument that "concern for the integrity of the conditions imposed by [the Arizona Enabling Act]" should by implication indicate the Court's concern for AMHEA management. *See* Petition at 18. Petitioners have made no substantive argument as to why the Court's ancillary and specifically tailored interest in *Asarco* should be generalized to embrace the facts presented in *Weiss II*.

Asarco was decided under a unique state enabling act which imposes rigorous and specific obligations upon the trustee state. This enabling act stands alone in this respect. *See Murphy v. State*, 181 P.2d 336, 343-46 (Arizona 1947). It is plainly distinguishable from the AMHEA which imposes no affirmative duties on Alaska regarding the management and disposition of trust lands. The AMHEA provides:

> Such land, income, and proceeds *shall be managed and utilized in such a manner as the Legislature of Alaska may provide*. . . . Such lands . . . may be sold, leased, mortgaged, exchanged, or otherwise disposed of *in such a manner as the Legislature of Alaska may provide*, in order to obtain

> funds or other property to be invested, expended, or used by the Territory of Alaska. AMHEA, § 202(e) (emphasis added).

This language stands in stark contrast to the act analyzed in *Asarco* where Congress provided that granted lands:

> shall be held in trust, to be disposed of in whole or in part *only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions,*. . . . Disposition of any said lands, . . . *in any manner contrary to the provisions of this Act, shall be deemed a breach of trust*. Arizona Enabling Act, ch. 310, § 28, 36 Stat. 557, 574-75 (1910) (emphasis added).

The AMHEA contains no such mandatory language.

Instead of presenting any substantial federal question, *Weiss II* presents the simple issue of interpreting a clearly written statute which delegates to the state significant authority and discretion regarding implementation of the statute's goals. The Court has repeatedly reaffirmed its faith in the ability of state courts to perform such a basic adjudicatory function. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980) (Court notes its "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its . . . confidence in their ability to do so"); *Huffman v. Pursue*, 420 U.S. 592, 611 (1975) (Court finds that "[a]ppellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities [to uphold federal law]. This we refuse to do".)

Other than their argument based on *Asarco*, it is unclear what specific federal interest Petitioners raise

with respect to trust management. Though Petitioners cite to various state cases enunciating trust principles, *see* Petition at 22-23, they point to no decision of the Court, or any body of federal law, with which *Weiss II* is in conflict.[4] This is so because the issues here are based on the law of trusts, and "[t]here is no free floating federal common law of trusts." *Price v. State of Hawaii*, 921 F.2d 950, 955 (9th Cir 1990), *cert. denied*, 502 U.S. 967 (1991). In the absence of a significant conflict between *Weiss II* and established federal law, Petitioners appear to be asking the Court to create federal common law. Though this is clearly within the Court's power, Petitioners present no compelling argument why the Court should do this now in a case so unique and specific to participants in Alaska's mental health program.[5]

Petitioners make two additional arguments that the *Weiss II* decision is worthy of Supreme Court review: (1) the settlement agreement approved by the Alaska courts was tainted by inadequate class representation; and (2) the Alaska Supreme Court has precipitated a split

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[4] Each of the cases Petitioners cite as indicative of their asserted "uniform authority" are uniformly decided under state enabling acts specific to that state. *See, e.g., City of Sierra Vista v. Babbitt*, 633 P.2d 333, 334 (Ariz. 1987); *Probst v. Nebraska Bd. of Educational Lands*, 55 N.W.2d 653, 657 (Neb. 1952), *cert. denied*, 346 U.S. 823 (1953). These cases are not generally applicable regarding principles of federal trust management, but are applicable only in analyses of the Nebraska and Arizona enabling acts, respectively.

[5] The Court has typically declined such invitations to create federal common law absent any necessity "to protect uniquely federal interests" or to "effectuate Congressional intent." *See generally* Erwin Chemerinsky, Federal Jurisdiction 336 (1994).

between itself and two circuits of the U.S. Court of Appeals. However, Petitioners here once again misstate and overstate their case.

Petitioners' first inadequacy of representation claim is entirely based on the assumption that the trial court's approval of the settlement was premised on the stipulated "set-off" to which the parties agreed thirteen years ago. *See* Petition at 27-28. Leaving aside for a moment that this again is an untimely request for the Court to review the "set-off" discussed in Section 1, *supra*, Petitioners provide no reference or other support for their assumption. That is because there is none. The Alaska Superior Court did not base its decision on this stipulation, but on the Alaska Supreme Court's decision in *Weiss I*.[6] Thus, the basis upon which Petitioners claim a violation of their due process rights finds no support in the record below.

Petitioners also seem to assert that review by the Court is warranted to resolve a conflict between the Alaska Supreme Court and two circuits of the U.S. Court of Appeals. Specifically, Petitioners argue that the Alaska Supreme Court failed to make explicit findings regarding the adequacy of class counsel contrary to *In re: G.M. Pick-Up Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd

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[6] This is evident from the trial court's and the Alaska Supreme Court's discussion of the issue. *See* Petition, App. at C 62-63; A 25-27. The doctrine of law of the case required the trial court to adhere to the previous decision in the same case by an appellate court. *See, e.g., Moog v. National Bank of Alaska*, 846 P.2d 806, 810 n.8 (Alaska 1993). Thus, an adequate and independent state ground existed for the trial court to reject Petitioners' claim that the stipulation of former class counsel was improper.

Cir.), *cert. denied*, 116 S.Ct. 88 (1995), and *In re: General Motors Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). *See* Petition at 29. To illustrate this apparent conflict, Petitioners point to a single footnote in *Weiss II*. However, upon a careful reading of *Weiss II*, the prior state court decisions in this case, and the cases upon which Petitioners rely, it is clear that Petitioners are claiming a conflict where no conflict exists.

Petitioners imply that the Alaska courts made only a cursory inquiry into the adequacy of class representation. This is patently untrue. Prior to granting preliminary approval of the settlement, the trial court conducted extensive evidentiary hearings into Petitioners' claims of collusion (Exc. 688-95; see R. App. 23-30) and found no basis to conclude that the settlement process was in any way corrupted. Furthermore, prior to granting final approval, the trial court assessed the competency of counsel as part of a seven-part analysis of the settlement agreement's fairness, adequacy, and reasonableness. *See* Petition, App. C 37-41. The definition of Petitioners' asserted conflict is even more difficult to discern as this seven-part test significantly parallels the nine-part test relied upon by the Third Circuit. *See In re G.M. Pick-Up*, 55 F.3d at 785. That the specifics of each test may differ is unremarkable, especially where the result is the same: the court made meaningful inquiry into the adequacy of class counsel.

Assuming, *arguendo*, that *Weiss II* did present a conflict with the Third and Seventh Circuits, this would be far from the "perfect opportunity to enunciate a Due

Process standard for the adequacy of class counsel's representation" as Petitioners conclusorily assert. *See* Petition at 29-30. Petitioners give no reason why *Weiss II* presents such an opportunity and none can be found. If the Court found *In re G.M. Pick-Up* undeserving of a grant of *certiorari*, there is little to suggest that this limited, state-based class action decided upon established federal precedent is more deserving of *certiorari* on the grounds Petitioners argue. This is especially so as the Third Circuit decision involved a multi-district, federal class action and the court of appeals outlined and discussed the various circuits' differing standards regarding adequacy of representation. If such a "perfect opportunity" existed for the Court to examine this issue, it was in *In re G.M. Pick-up*, but the Court there declined to do so.

3. Petitioners Have Failed to Preserve Issues Over Which They Now Seek Review

Petitioners assert that their federal rights were violated because *Weiss II* incorporated an improper definition of the trust's beneficiary class which included future mental health program participants who might be added by the legislature. This issue is not ripe for review as the legislature has added no new beneficiaries.

Petitioners also allege that *Weiss II* erroneously permits the mentally retarded and defective to benefit from the trust. However, Petitioners themselves requested this expansion of the class.[7] Accordingly, having sought the

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[7] In 1994, Petitioners requested the trial court to redefine the class to include the mentally defective and retarded. Exc.

very relief at trial over which they claim error on appeal, the doctrine of invited error provided the Alaska Supreme Court adequate and independent state grounds to reject Petitioners' claim. *See* 5 C.J.S. *Appeal* § 745 ("An appellant . . . is estopped, or will not be permitted, to take advantage of errors . . . he has invited or induced the trial court to commit, as where the ruling . . . was made at his request or suggestion."); *see also Barrett v. State*, 772 P.2 559, 568-69 n.10 (Alaska App. 1989) (" 'Invited error' occurs when the court takes erroneous action at the express request of the [appellant], and then the [appellant] urges reversal on that basis. . . . ").

Petitioners further assert their federal rights were violated when the trial court assessed the class' mismanagement claims as speculative. Even if this raised some federal issue, Petitioners themselves advised the class that these claims were dubious. *See* Petition, App. at C 64 n.74.

CONCLUSION

Reduced to its essence, Petitioners' brief presents no more than their disagreement with how the trial court viewed the fairness, reasonableness and adequacy of the

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1165-73. The trial court granted Petitioners' request. In 1992, when endorsing a prior settlement proposal, Petitioners also requested that the class include "other persons needing mental health services as the legislature may properly determine". Exc. 1079-85. Petitioners cannot now petition for *certiorari* claiming federal rights were compromised by the very relief they sought below.

settlement approved in *Weiss II*. Petitioners do not claim that an incorrect rule of law for approval of class actions was applied by the trial court, or Alaska Supreme Court, in derogation of any federal right. Rather, they ask the Court to create new law out of whole cloth. More than twelve years of litigation and settlement attempts transpired between the Alaska Supreme Court's decision in *Weiss I* and its approval of the settlement in *Weiss II*. The labyrinth of proceedings which led to settlement is poor cloth indeed from which to fashion new law and is itself a compelling reason to deny the writ. The settlement approval process in this case was inherently driven by a unique and complex series of facts and events. The underlying law upon which the case is based is singular to beneficiaries of the state mental health program in Alaska. Even were there some wrong for the Court now to correct, it would have no effect beyond the boundaries of the 49th state.

For these reasons, Respondents request the Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

PHILIP R. VOLLAND
RICE, VOLLAND & TAYLOR, P.C.
211 H Street
Anchorage, AK 99501
(907) 276-5231

Counsel of Record
for Respondents H.L., M.K. and Alaska Addiction Rehabilitation Services

JAMES H. PARKER
DISABILITY LAW CENTER OF ALASKA
615 E. 82nd Ave, Suite 101
Anchorage, AK 99518-3158
(907) 344-1002

Counsel of Record
for Respondents Bosel, Doulin, Goodwin and Mayoc

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STATE OF ALASKA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Alaska Supreme Court

BRIEF FOR THE STATE OF ALASKA IN OPPOSITION

BRUCE M. BOTELHO*
Attorney General
State of Alaska

NATHANIEL B. ATWOOD
Assistant Attorney General
State of Alaska
Department of Law
1031 W. 4th Avenue, Ste. 200
Anchorage, Alaska 99501
(907) 269-5100

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In 1994, after extensive briefing, a four day evidentiary hearing on preliminary approval, notice to the class, comments from the class favoring settlement by a two-to-one margin, and a two week evidentiary hearing on final approval, an Alaska Superior Court approved the settlement of a twelve-year-old class action, finding it fair, adequate, and reasonable. In 1997, after thoroughly reviewing that decision, the Alaska Supreme Court affirmed. The questions presented are:

1. Does a state court approval of a settlement of claims arising out of a federally created trust implicate any federal rights of class members when no adjudication of federal law occurs during the approval process?

2. May dissenting class members claim a violation of due process or other federal rights with regard to state court decisions issuing relief which they themselves requested?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

Respondent State of Alaska respectfully opposes Petitioners' request for a writ of *certiorari*.

JURISDICTION

Petitioners ask this Court to review, *inter alia*, the Alaska courts' allowance of monies spent by the state on mental health care as a set-off against the state's potential liability in *State v. Weiss*, 706 P.2d 681 (Alaska 1985) ("*Weiss I*"), Appendix to Petition for Certiorari B ("App. B.") B-4, 8. For purposes of review, however, *Weiss I* became final when it was published on October 4, 1985. Assuming, *arguendo*, that the allowance of the set-off presents a federal question, it was conclusively decided in 1985, and the outcome of further proceedings with respect to whether the set-off applies was "preordained" on remand. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975). Review in this Court was not timely sought, and this Court does not have jurisdiction to review that twelve-year-old opinion. Sup. Ct. R. 13; 28 U.S.C. § 2101(c).

INTRODUCTION

This petition arises from a settlement, not from an adjudication on the merits. Three individuals (collectively "Weiss") ask this Court to review a judgment of the Alaska Supreme Court, *Weiss v. State*, 939 P.2d 380 (Alaska 1997) ("*Weiss II*," App. A), affirming a trial

court's approval of a settlement as fair, adequate, and reasonable. App. C.

This case presents no question of federal law. The federal statute tangentially involved here is unique and differs substantially from other public land trust statutes. No conflicts between or among courts and no special or compelling reason to place it on this Court's restricted docket are presented. Instead, Weiss's claims reduce to complaints that the Alaska courts, though applying the correct legal standard for evaluating a proposed class action settlement (comparison of the benefits offered in settlement with the likely results of litigation[1]), did not adopt *his* view of the legal and factual litigation risks. *Cf.* Sup. Ct. R. 10 (*certiorari* "rarely granted" when asserted error consists of erroneous factual findings or properly stated rule of law).

At bottom, Weiss asks this Court to review the factual findings and discretionary decisions of the Alaska courts and rule as a matter of law that the trial court fundamentally misunderstood the litigation it presided over for eight years and erroneously evaluated the evidence presented in over two weeks of hearings on the fairness, adequacy and reasonableness of the settlement. The Alaska Supreme Court thoroughly reviewed both the trial court's decision and the approval process and concluded that the trial court's approval of the settlement "demonstrated a sound

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[1] *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (courts to judge fairness of proposed settlement by weighing plaintiff's likelihood of success on merits against benefits offered in settlement; courts are not to decide merits of case or resolve unsettled legal questions).

understanding of the relevant authority and the facts of this case, as well as a keen regard for the rights and interests of the plaintiff class." *Weiss II*, App. A-49.

The Alaska courts were correct. Nothing about this case compels further review in this Court.

STATEMENT OF THE CASE[2]

1a. In 1956 Congress granted Alaska one million acres of federal land in trust to fund a mental health program for Alaska. Alaska Mental Health Enabling Act, Pub. L. No. 84-830, 70 Stat. 709 (1956) ("AMHEA"); *Weiss I*, App. B. Unlike other public land trusts, the AMHEA expressly authorized the expenditure of both income and proceeds from any dispositions of trust land, did not restrict those expenditures exclusively to the stated purpose (mental health) and vested the Alaska legislature with broad discretion in managing the trust. In 1978, the state legislature redesignated the trust land as general grant land. In 1982, this class action was filed alleging that Alaska had breached the trust.[3] *Weiss I*, App. B-4.

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[2] The settlement now before this Court closes a long and complex procedural and factual history. Weiss's lengthy Statement of the Case omits much. A more complete picture is set forth by the courts below. *See* App. C, A; Respondents' Appendix (hereinafter "R. App.").

[3] The class was certified under Alaska R. Civ. P. 23(b)(2) (*i.e.*, seeking only injunctive or declaratory relief for the class as a whole; no monetary relief to be distributed to individual class members). App. C-29-30.

b. In 1985, the Alaska Supreme Court agreed. The court remanded for the trust to "be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." *Weiss I*, App. B-7. The trial court was instructed that "sold" lands would not be returned to the trust; instead the trust would be compensated at fair market value. In calculating the total amount owed, the trial court was instructed to grant a set-off for mental health expenditures made by the State during the same period. App. B-8.

c. Following the *Weiss I* remand, the parties realized that to reconstitute the trust as directed would be a Herculean task. It would implicate literally thousands of factual determinations, for example, over "sold" parcels and mental health expenditures.[4] It could take years to resolve, and cost millions of dollars. App. C-6-8, 11-12, 54-55.

The *Weiss I* remand instructions also posed significant litigation risks to both sides. Therefore, the parties actively pursued a settlement. Major attempts at settlement were made through legislation in 1987, 1990 and 1991, before the case was finally settled in 1994 in the HB 201 settlement.[5] App. A-7-9.

Counsel for Weiss were proponents of the 1991 settlement attempt (the "chapter 66 settlement"). It contemplated parcel-by-parcel exchanges. The trust would retain

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[4] In 1994, it was estimated that the State had spent more than $1.3 billion on mental health that could be set-off under *Weiss I*. App. C-62-63.

[5] "HB 201" refers to the first draft of the enabling settlement legislation; it is the designation adopted by the parties and courts in the proceedings below.

certain original trust parcels and the rest would consist of replacement state land selected by plaintiffs.[6] App. C-14; *Weiss II*, App. A-9. Chapter 66 also amended portions of the State's mental health program and created a new agency, the Alaska Mental Health Trust Authority, to act as trustee. *Id.*; App. C-14. In December, 1993 the court denied preliminary approval to the chapter 66 settlement. App. C-16.

2a. Negotiations for the HB 201 settlement spanned six months, January-June, 1994. All counsel actively participated in the negotiations. The settlement built on the failed chapter 66 settlement.

b. The resulting settlement reconstitutes the trust with almost 1 million acres of land (approximately 60 percent original trust land and 40 percent replacement land, identified by Weiss's land staff). It establishes the Alaska Mental Health Trust Authority to act as trustee and to oversee the State's mental health program, creates special budgeting advantages for mental health program funding, and makes various mental health program improvements. It does not include any set-off.

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[6] Weiss assembled an expert land staff funded by the State to evaluate trust land and potential replacement land. The staff included petitioner Nanuwak's counsel, James Gottstein, and was headquartered in his law offices. The staff compiled considerable information on trust land and potential replacement land. The State paid Weiss's counsel and land staff more than $2.1 million to study land pursuant to the chapter 66 settlement. R. 19329-19331. These amounts were in addition to court awarded attorney fees and costs. In all, Weiss's counsel have been paid more than $7 million for their participation in this case. R. 25436, 25882.

The settlement also provides benefits desired by Weiss and the class that will be lost if litigation is continued. It preserves corpus by establishing a permanent fund for mental health programs with $200 million, and proceeds from trust land disposals attributable to principal will be invested there, as well.

The settlement provides for management of trust land "solely in the best interests of the beneficiaries" through a special unit within the Alaska Department of Natural Resources. App. C-19-29; Alaska Stat. § 38.05.801; 11 Alaska Admin. Code 99.020.

3a. The settlement approval process covered seven months, June-December, 1994. Following extensive briefing, the court held a four day hearing on preliminary approval. Tr. XIII-XVI. The trial court carefully scrutinized the negotiations and concluded that they were serious, informed, and noncollusive. R. App. 23-30; App. C-38 n.46. The Court granted preliminary approval on July 29, 1994. R. App. 58.

b. Notice of the proposed settlement was given to the class in August 1994.[7] The notice was mailed to every postal address in Alaska, published in the State's 23 largest newspapers, and announced on radio and television. Plaintiffs' attorneys and advocacy groups held meetings for beneficiaries and their families or guardians

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[7] On Weiss's motion, the class was redefined, by order dated August 2, 1994, to make the class "co-extensive with the beneficiaries of the trust." *Weiss II*, App. A-39; C-31. Weiss now claims that this redefinition he sought constitutes error. Pet. 26-27.

to explain the settlement and answer questions about it. App. C-32-37.

The notice and comment period lasted more than ten weeks. Both written and oral comments were received and reviewed by the court. App. C-36, 80, 84. Overall, the class favored the settlement by a two-to-one margin. App. C-80, C-84-85.

c. After more briefing, the court held a two week evidentiary hearing on whether final approval should be granted. App. C-39 n.49; *Weiss II*, App. A-48; Tr. XVII-XXVI.

4a. While Weiss attacked the settlement on various grounds, his opposition derived principally from the opinion of a single expert that non-returned original trust land holds minerals worth "billions of dollars." This notion continues to permeate Weiss's pleadings. Pet. 14, 24.

b. The record, however, does not support such inflated values. Weiss's mineral expert's methodology was thoroughly discredited by experts called by the settlement proponents. App. C-63-73. Their criticisms, which the trial court found credible, reduced Weiss's mineral value estimates by 90 percent. *Id.*; *Weiss II*, App. A-16-17. The trial court concluded "[t]he risk is that trial would result in a finding of gross overstatement." App. C-70.

5. Ultimately, in December 1994, in a 137-page decision exhaustively explaining her reasoning, addressing each point in opposition, and following each applicable standard, the trial court granted final approval of the settlement, finding it to be fair, adequate, and reasonable and in the best interest of the class. App. C. Weiss appealed.

In a thorough 55-page opinion, the Alaska Supreme Court affirmed the superior court's decision. App. A.[8]

REASONS FOR DENYING THE WRIT

I. NO FEDERAL QUESTION IS PRESENTED; NEITHER THE DECISIONS BELOW NOR THE RECORD RAISE THE QUESTIONS PRESENTED IN THE PETITION.

1a. Weiss makes various attempts to convince this Court that the Alaska courts adjudicated important federal questions, made rulings that conflict with rulings of this and other courts, and violated his federal rights. Weiss obscures the procedural posture of the case, relies on factual assertions that have no support in the record, and omits relevant facts. On almost every issue he raises in the petition, moreover, Weiss took a contrary position below and has failed to preserve the arguments now advanced.

b. This petition does not arise from an adjudication on the merits; it arises from the state courts' approval of a settlement of the class's claims. No federal question was decided; no federal question is properly raised here. In approving the settlement, the Alaska courts scrupulously followed Alaska's rules pertaining to class action settlements.[9] App. A, C; R. App.

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[8] Petitioner's Appendix compresses and re-paginates the decisions.

[9] Since the case was filed in state court under Alaska R. Civ. P. 23, the state rules apply. However, Alaska's rules on

All but one of the issues that Weiss suggests were "adjudicated" or "determined" were not.[10] They were simply weighed as litigation risks, for purposes of comparison with the settlement. The Alaska courts properly did not reach the merits of the case or resolve unsettled legal questions. *Carson*, 450 U.S. at 88 n.14 ; *Weiss II*, App. A-14 n.10. Since the questions raised by Weiss were not actually decided below, this case does not merit review. *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982) (this Court reviews "judgments, not statements in opinions").

II. EVEN IF A FEDERAL QUESTION HAD BEEN DECIDED (AND NONE WAS), REVIEW WOULD NOT BE WARRANTED BECAUSE THE AMHEA IS UNIQUE AND DIFFERS SUBSTANTIALLY FROM ALL OTHER PUBLIC LAND TRUST STATUTES.

Even if the Alaska courts had actually decided the questions raised in the petition, this Court's discretionary review would not be warranted. The AMHEA tangentially involved here and the settlement under it are unique to Alaska and affect only Alaskans. *See* App. A-19-22 (distinguishing the school trust cases relied on by Weiss based on differences between the AMHEA and the detailed disposal procedures and constitutional provisions governing the school trusts). Any determination

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approving class action settlements are consistent with those applied under the federal rule. *See* App. A-12-14.

[10] The only exception to this is the redefinition of the class, made on Weiss's own motion. Weiss's arguments regarding the class definition are addressed in § IV. D.

regarding the requirements of the AMHEA would rest solely on its unique terms and would have no application to any other state.

Because the questions raised in the petition (even though not decided below) have significance only to Alaska, this case does not present an important federal question meriting review by this Court. Sup. Ct. R. 10 (requiring petition to raise an *important* federal question).

III. BECAUSE THE AMHEA IS UNIQUE AND DIFFERS SUBSTANTIALLY FROM ALL OTHER PUBLIC LAND TRUST STATUTES, THERE IS NO CONFLICT WITH THIS OR OTHER COURTS.

Similarly, the fact that the AMHEA is unique and differs substantially from all other public land trust statutes means that the Alaska courts' approval of this class action settlement does not conflict with "rulings of this and the other courts considering the same legal issue" as Weiss claims. Pet. 18. Neither this Court nor any other has had occasion to rule on "the same legal issues" and, given the uniqueness of the AMHEA, will not likely have occasion to do so in the future. Cases from this or other courts construing different public land trust statutes that contain vastly different terms applicable to other states are simply inapposite, not conflicting.

Because no conflict with this or other courts is presented, *certiorari* should be denied.

IV. THERE IS NO OTHER SPECIAL OR COMPELLING REASON FOR GRANTING REVIEW.

Class members favored the settlement over continued, protracted litigation by a two-to-one margin. The bottom-line question, whether the settlement is fair, adequate, and reasonable, turns on the unique and complex facts of the case, especially those involving valuation issues. *See* App. C-63-74. Two Alaskan courts carefully considered those unique and fact-dependent questions and concluded that the settlement is in the class's best interest. This Court should not review, much less disturb, that determination.

A. The Alaska courts correctly weighed the litigation risk posed by the set-off. Weiss waived arguments to the contrary. No federal question was decided, and no conflict is presented.

1a. Weiss first argues that the Alaska courts misapplied federal law with respect to the set-off provided for in *Weiss I*. Pet. 18-22. Indulging Weiss's untimely contention that the set-off established in *Weiss I* is not binding, the trial court and *Weiss II* considered the set-off as one of the many litigation risks against which the benefits of settlement were weighed. The Alaska courts correctly analyzed that risk, and no important issue or conflict justifying review by this Court exists.

b. There is a clear litigation risk that the *Weiss I* court's decision is final and that collateral estoppel principles, under state law, bar relitigation of that issue. Weiss and any other plaintiff could have sought relief from the 1985

judgment allowing the set-off, but never did so. *Cf. Richards v. Jefferson County, Ala.*, ___ U.S. ___, 116 S. Ct. 1761 (1996).

2. Moreover, Weiss took a position below that is completely contrary to the position he takes here. In seeking approval of the chapter 66 settlement, he stated:

> The impact of the setoff [sic] is substantial. . . . [T]here is no question that a significant amount of money has been spent on the mental health program and can be setoff [sic] under the Supreme Court's decision. . . . [I]f the litigation continues it would only be after the value of the trust corpus was reduced by the amount of the setoff [sic] that the trust would receive any compensation in money. . . . [I]t would be imprudent to expect either the Alaska Supreme Court to overrule itself on this point, or the United States Supreme Court to reverse the Alaska Supreme Court.

Exc.[11] 1064-1065 (footnote omitted).

3a. The high litigation risk that both Weiss and the Alaska courts attributed to the set-off comes directly from the express terms of the AMHEA itself. Section 202(e) of the AMHEA provides, in relevant part:

> All lands granted . . . together with the income therefrom and the proceeds from any dispositions thereof, . . . shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized as the

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[11] The designation "Exc." refers to the Excerpt of Record prepared for the Alaska Supreme Court.

> Legislature of Alaska may provide. Such lands . . . may be sold . . . or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds . . . to be invested, expended, or used by . . . Alaska.

b. The *Weiss II* court agreed with the trial court that the language of the AMHEA could be reasonably interpreted as expressly permitting the State to fund mental health programs by selling trust assets. *Weiss II*, App. A-26. Again, the Alaska courts reviewing the settlement did not decide that the set-off applied; they correctly determined that there was a significant risk that it would apply if the case were litigated to conclusion.

4. Further, *Weiss II* found an independent state ground for affirming the trial court's risk analysis regarding the set-off: the set-off is consistent with general trust principles. App. A-26-27, nn.21, 22; *see, e.g., Restatement (Second) of Trusts* § 244 and comments c and e (1959) (trustee entitled to reimbursement from the trust estate for expenditures on behalf of beneficiaries).

B. The Alaska courts correctly weighed the litigation risk that certain original trust lands would be considered "sold" and not recoverable: no federal question was decided, nor is any conflict presented.

1. Weiss next argues that the settlement should have been rejected because the trust is entitled to recover land

disposed of in breach of trust.[12] Pet. 22-23. His argument reduces to this: the Alaska courts erroneously assessed the litigation risk that the trust could not recover lands sold to third parties. Weiss bases this claim of error on cases from Arizona and Nebraska interpreting their respective enabling acts. *Id.*

Nothing here is worthy of review. The question was weighed, not adjudicated. Absent a decision on point, there can be no conflict with a decision from any other court. *Hogan*, 458 U.S. at 723, n.7.

2a. Even if Weiss's argument is indulged, his reliance on Arizona and Nebraska school trust cases to establish a conflict is misplaced. There are crucial legal and factual differences between those cases and this one. The Arizona trust requires preservation of corpus in perpetuity, mandates detailed procedures to dispose of trust land, dedicates the proceeds of disposals to school purposes and expressly provides that any sale or lease "not made in substantial conformity with the provisions of [the Arizona Enabling Act] shall be null and void." *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 462 (1967); *see also, ASARCO, Inc. v. Kadish*, 490 U.S. 605, 625-29 (1989) (describing terms of Arizona Enabling Act).

In contrast, the AMHEA authorizes expenditures of both income and proceeds from disposal of trust lands, vests broad discretion in the Alaska legislature to adopt

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[12] This argument begs the question it purports to answer. The 1978 legislation that redesignated trust land as general grant land was a breach of trust. However, to-date, not a single disposition of any trust parcel to a third-party has been determined to have been in breach of trust.

procedures for disposals and requires only that income and proceeds from disposals "first" be used to fund mental health programs. AMHEA § 202(e).

b. Similarly, the Nebraska cases rely on trust duties fixed in Nebraska's constitution. *See, e.g., State ex rel. Ebke v. Board of Educ. Lands and Funds*, 47 N.W. 2d 520, 523 (Neb. 1951). Therefore, "violation of [Nebraska's] duty as trustee is a violation of [Nebraska's] constitution itself." *Id. See also, State v. University of Alaska*, 624 P.2d 807, 815 n.11 (Alaska 1981) (distinguishing Nebraska trust cases based on differences in state constitutional law).

c. Given these distinctions, it was not error for the Alaska courts to conclude that there was a significant litigation risk that substantial trust land would be considered "sold" and not subject to recovery. *See* App. A-18-20. Nor would there be any decisional conflict for this Court to resolve even if the Alaska courts had adjudicated the issue, which they did not.

C. The Alaska courts properly weighed the litigation risks associated with the mismanagement claim; no federal question was adjudicated, and Weiss waived this issue.

1. Weiss next argues that the class's mismanagement claim was not properly valued in the court's settlement approval analysis.[13] He implies that an important federal question was adjudicated, claiming that the trust is entitled to mismanagement damages based on federal law,

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[13] His main complaint here seems to be that the court sustained evidentiary objections against him. Pet. 23-24.

and that the Alaska courts "foreclose[d] [that claim] after acknowledging that it had not been the subject of factual or legal development." Pet. 24.

No federal question was adjudicated. The Alaska courts did not rule that the class had no viable mismanagement claim. Instead, they properly weighed the class's likelihood of recovering damages for that claim against the benefits offered in the settlement. *See* App. A-27-30; C-63-65, 65-70. Weiss simply misapprehends the legal and evidentiary distinction between establishing liability on one hand and recovering damages on the other.[14]

2. Further, Weiss waived this issue by opining to the court and class below that the mismanagement claim is weak because "it would be very difficult to prove what should have been earned." App. C-64 n.74.

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[14] For example, the alleged mismanagement damages were based largely on mineral values that the trial court predicted would be found to be grossly overstated. *See* App. A-28-30. Also, under Alaska law, a damages award cannot be based on speculation. "There is a substantial risk that the plaintiffs would be left with speculative damages for which they could be awarded nothing." App. A-28; C-65; *see also Ben Lomond, Inc. v. Schwartz*, 915 P.2d 632, 637 (Alaska 1996) (evidence must afford sufficient data from which court or jury may properly estimate amount of damages; such data must be established by facts rather than mere conclusions of witnesses).

D. The judgment of the Alaska courts is consonant with the AMHEA; Weiss raises issues that are not ripe and that he waived below.

1. Weiss claims that the settlement violates the AMHEA in two ways: (1) that the trust land management provided for under the settlement "violates the duty of undivided loyalty;" and (2) that the settlement allows income to be spent "on purposes not authorized by Congress." Pet. 24. Weiss mischaracterizes the settlement and raises questions that are not ripe and on which he took a contrary position below.

2a. Even if the settlement lacked the undivided loyalty management standard as Weiss claims, and it does not, the issue would not be ripe. No complaint has been filed, nor any decision rendered below, even suggesting that those charged with managing trust land under the settlement have acted with divided loyalty.

b. Moreover, the settlement requires that lands "be managed consistent with the trust principles imposed" by the AMHEA. Alaska Stat. § 38.05.801(a). The settlement legislation required promulgation of regulations governing the management of mental health trust lands. Alaska Stat. § 38.05.801(c). These regulations expressly require management with undivided loyalty to the trust:

> Trust land shall be managed consistently with trust responsibilities accepted by the state under the [AMHEA], ***which means that management shall be conducted solely in the best interest of the Alaska mental health trust and its beneficiaries.***

11 Alaska Admin. Code 99.020(b) (emphasis added).

Thus, the settlement provides the very management standard that Weiss claims is lacking. There is no divided loyalty.

3a. Weiss also alleges that *Weiss II* erroneously allows trust monies to be spent in contravention of the AMHEA. He claims that the class definition improperly adds, or permits the addition of beneficiaries, and thereby "dilutes the interests of the beneficiaries designated by Congress." Pet. 25-27.

b. Weiss waived any claim that the class definition is improper. ***He*** filed a joint motion to amend the class certification, asking for the very class definition that he now claims is improper. He asked the court to amend the class certification to read, in relevant part:

> all persons who are residents of the State of Alaska and are:
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> . . .
>
> (ii) mentally defective or retarded;
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> . . . [or]
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> (v) other persons needing mental health services as the legislature may properly determine should be beneficiaries of the trust created under [the AMHEA].

Exc. 1081-1082.

The stated purpose of the motion was "to make the class coextensive with the beneficiaries of the Trust." *Id.* Weiss filed the motion with his motion for preliminary approval of the proposed chapter 66 settlement. That settlement included statutory changes to improve the funding and delivery of mental health services. One such

change is codified at Alaska Stat. § 47.30.056. In his motion for preliminary approval of the chapter 66 settlement, Weiss highlighted Alaska Stat. § 47.30.056. He lauded its requirement that trust monies be spent to "provide a reasonable level of necessary services to . . . (2) the mentally defective and retarded; . . . and (5) other persons needing mental health services as the legislature may determine." R. 736. Weiss summed up the mental health program funding scheme established in Alaska Stat. § 47.30.056 as follows:

> This is a critical element in the proposed settlement that assures those in most need ***and those for whom the Trust was initially created are actually benefited by the Trust.*** This provision tracks this court's [1988 Order: App. D], ***and was agreed to by virtually all of the interested groups, including all of the Plaintiff groups, the Alaska Mental Health Board, and the Department of Health and Social Services.***
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> AS 47.30.056 (d)-(g) . . . establish the conditions (mental disorders) that qualify for treatment using trust funds and also establish treatment priorities. These provisions can be updated to keep pace with advances in scientific knowledge and professional practice. ***Again, these provisions were agreed to by all of the interested parties and groups.***

R. 737 (emphasis added). In reply to opposition to his motion for preliminary approval, Weiss assured the court that "everything in the proposed settlement is constitutional or otherwise legal. . . . " R. 12030.

Alaska Stat. § 47.30.056, the very statutory provision that Weiss lauded above, and that contains the same

class/beneficiary definition and funding scheme that Weiss now claims is illegal, is part of the HB 201 settlement.

c. Weiss's allegation that the class definition violates federal law by permitting the legislature to "add to the beneficiaries specified by Congress," Pet. 25, is also not ripe. There has been no claim nor any decision below suggesting that the legislature has added any beneficiaries to the State's mental health program that would not fit within those intended by Congress to benefit from the AMHEA.

4a. Similarly, Weiss's claim that the approved settlement allows trust fund expenditures outside of those provided for in the AMHEA is also neither preserved nor ripe. As shown above, the HB 201 settlement contains the same statutory provision, Alaska Stat. § 47.30.056, that details how necessary services are to be prioritized and funded. According to Weiss, everyone involved or interested in this case approved of these terms. He told the court below that the service funding scheme was "legal."

b. Further, the HB 201 settlement contains an overarching restriction that ensures spending in compliance with the AMHEA. Alaska Stat. § 37.14.009(a)(1) imposes a fiduciary obligation on the Trust Authority to "ensure that the assets of the trust are managed consistent with the requirements of the [AMHEA]." This management mandate clearly encompasses spending of trust income. There is nothing in the record of this case, nor anywhere else, indicating that the Trust Authority has failed to meet this standard. Weiss presents nothing worthy of this Court's review.

E. The class received full due process and more than adequate representation. Weiss waived the issues he now raises, and no conflict is presented.

Weiss asserts that the class was denied due process. His is a construct of erroneous assumptions: the set-off, resulting solely from the original class counsel's inadequate representation, created the risk that the class would obtain no monetary recovery in litigation, which in turn drove settling counsel to support the HB 201 settlement, which they would not have done if they had adequately evaluated the class's mismanagement claim. Pet. 27-30.

1. As shown above, the set-off was a significant litigation risk as a matter of law, based on the express terms of the AMHEA and general trust principles. Second, original class counsel left this case in 1985. In the twelve years since then, no other plaintiff's counsel has taken any action to challenge the set-off provided for in the 1985 *Weiss I* decision.[15] Moreover, the HB 201 settlement does not include the set-off.

2. Weiss waived any claim that settling counsel failed to adequately assess the class's mismanagement claim by

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[15] New class counsel was substituted three days after *Weiss I* was published and was granted an extension of time to decide whether to petition the Alaska Supreme Court for rehearing. He did not challenge the court's decision. Current class counsel replaced him in April 1986. App. C-9 n.8. He never sought relief from the set-off judgment, either. Counsel of record for Petitioners sought intervention in part to challenge the set-off provided for in *Weiss I*. R. 6866. He made no such challenge. Instead, he later declared that he and his clients were generally satisfied with *Weiss I*. App. A-29.

his own assessment of it. In 1993, he urged the court to approve and the class to support the chapter 66 settlement, despite the mismanagement claim that he now contends is worth billions. He told the court:

> The Plaintiffs have also argued that before taking the setoff [sic] the court should consider what the Trust should have earned if it had been properly managed (lost opportunities). While Plaintiffs' [sic] believe this is the correct result, ***it involves problems of proof and results in a level of complexity approaching and even possibly exceeding the title challenges to the approximately 6,000 third party interests.***

R. 730 (emphasis added). Weiss advised the class that "[e]ven if Plaintiffs were able to establish the [mismanagement] principle, it would be very difficult to prove what should have been earned." App. C-64 n.74.

Weiss was correct. Neither settling counsel nor the Alaska courts erred in placing little litigation value on the mismanagement claim. There was no due process violation.

3a. Finally, Weiss argues that *certiorari* should be granted so the Court can "enunciate a due process standard for the adequacy of class counsel's representation." Pet. 30. He suggests a conflict between the Alaska Supreme Court and the Third and Seventh Circuits. *Id.* at 29. There is no conflict. The cases relied on by Weiss and the Alaska courts are in agreement that a trial court should consider whether a proposed settlement is the result of adequate representation.

b. What the *Weiss II* court rejected was Weiss's argument that a settlement approval must be reversed if the

trial court merely fails to express the incantation that "representation was adequate." There is no authority nor reason for the *per se* rule Weiss now desires. App. A-41 n.30; *cf. In re General Motors Engine Interchange Litig.*, 594 F.2d 1106, 1133 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) (declining to adopt *per se* rules rigidly confining trial court's exercise of discretion in supervision of class actions).

c. Moreover, Weiss did not preserve the issue he now advances. He did not raise it before the trial court. Indeed, Weiss advocated for the very standard on adequacy of representation employed by the trial court, *i.e.*, whether the proposed settlement is "the product of serious, informed, non-collusive negotiations." R. 719, 20670-20671. Weiss would elevate form over substance, inviting absurd results. He would have a settlement that compares favorably with the likely results of litigation and is demonstrably in the best interest of the class reversed for want of an incantation that "representation was adequate," even when the record clearly supports that precise finding. App. A-41-42 n.30. This is not the standard in any Circuit nor should it be a standard mandated by this Court.

d. In this case the trial court carefully considered whether representation by settling plaintiffs' counsel was adequate. Much of the preliminary approval briefing and hearing was devoted to that question, as was a significant portion of the court's lengthy decision granting preliminary approval. *See* R. App. 23-30. The court concluded that "the proposed settlement is the product of serious, informed, noncollusive negotiations." *Id.* at 30. In granting final approval the trial court stated:

> [C]ounsel for the class supporting the settlement . . . had sufficient experience and knowledge and access to knowledgeable staff[16] to represent the class adequately.
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> . . . .
>
> The court concludes that plaintiffs' attorneys had sufficient information, under the circumstances, with which to negotiate this settlement and evaluate the difficulties of obtaining full relief at trial. The court also finds that the information presented to the court during the preliminary and final approval process has been adequate for the court's evaluation of the settlement and risks of continued litigation.

App. C-89, 91. By even the most inflated notions of due process, the Alaska courts' findings are more than sufficient.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

BRUCE M. BOTELHO*
Attorney General

NATHANIEL B. ATWOOD
Assistant Attorney General

*Counsel of Record

[16] The court was referring here to Weiss's land staff.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

(Filed July 29, 1994)

Case No. 4FA-82-2208 Civil

MEMORANDUM DECISION AND ORDER RE: PRELIMINARY APPROVAL OF HB 201 PROPOSED SETTLEMENT AGREEMENT

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I. INTRODUCTION

Two motions for preliminary approval of a new proposed settlement agreement, filed June 10, 1994, are

before the court. The court held in evidentiary hearing and oral argument on July 12-22, 1994, regarding whether the proposed settlement should be preliminarily approved. Plaintiffs Anita Bosel, Frances Doulin, Sharon Goodwin, and Gabriel Mayoc ("Bosel"), H.L., M.K., and Alaska Addiction Rehabilitation Services ["H.L."] and defendant State of Alaska ["State"] urge the court to grant preliminary approval of the proposed settlement. Plaintiffs Vern Weiss and Earl Hilliker ["Weiss"], and the Alaska Mental Health Association, Mary C. Nanuwak, and John Martin ("AMHA") oppose preliminary approval of the settlement.

Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited ["Public Interest Intervenors"] filed a memorandum supporting the proposed settlement. Marathon Oil Company and Union Oil Company of California ["Oil Company Intervenors"] also filed a response supporting preliminary approval of the proposed settlement.

II. BACKGROUND

This class action began in November 1982, with allegations that the State had breached its obligations to the beneficiaries of the mental health lands trust.

The mental health lands trust was created by Congress in the Alaska Mental Health Enabling Act of 1956 ["Enabling Act"]. Pub. L. No. 84-830, 70 Stat. 709 (1956). The Enabling Act transferred responsibility for mental

health programs from the federal government to the Territory of Alaska and granted one million acres of land to the Territory to aid in the financial support of a comprehensive mental health program.[1] Pub. L.No. 84-830, §§ 101, 202, 70 Stat. 709 (1956). Section 202(e) stated:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

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[1] In 1956 no mental health program existed in Alaska; the federal government transported mentally ill and mentally retarded people in need of hospitalization to the Morningside Hospital in Portland, Oregon. The history surrounding passage of the Enabling Act was discussed in the court's Memorandum Decision and Order of April 27, 1988, which analyzed congressional intent regarding the beneficiaries of the trust.

Section 6(k) of the Alaska Statehood Act confirmed and transferred the mental health trust to the State. Pub. L. No. 85-508, § 6(k), 72 Stat. 339 (1958).

The State of Alaska managed the mental health lands without maintaining separate accounting for the trust. In the 1970's there was pressure on the legislature to convey state-owned land to private individuals and municipalities. Because the mental health trust lands were some of the first land parcels to be selected by Alaska, trust lands were among the most attractive state lands for both private development and public purposes. In 1978, the legislature removed mental health lands from trust status and redesignated them as general grant lands.[2] Ch. 181, § 3(a), SLA 1978. A percentage of all State land revenue was to be paid to the mental health trust fund to compensate the trust, but no money was ever appropriated by the legislature to the fund. *See* Ch. 181 § 4, SLA 1978.

The State proceeded to transfer large amounts of original trust land after the redesignation legislation. A large amount of original mental health trust land was set aside for public purposes such as parks, recreation, and wildlife habitat. Much of the trust land located within municipal boundaries was transferred to municipalities, who later sold some land to private individuals. Many of the trust lands most suitable for development were sold to private individuals through the State's land sale programs. Overall, up to 50,000 acres were conveyed to

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[2] State general grant lands are those granted to Alaska through subsections (a) and (b) of Section 6 in the Alaska Statehood Act. Pub. L. No. 85-508, § 6(a) and (b), 72 Stat. 339 (1958).

private individuals, over 40,000 acres were conveyed to municipalities, and over 350,000 acres were placed in legislatively designated areas[3] such as state forests, parks, and wildlife areas. Only about 35-40% of the original one million acres of trust land remain unencumbered and in unfettered state ownership.

Weiss and Hilliker, the original named plaintiffs, filed this lawsuit as a class action on November 26, 1982. They claimed that the State breached the trust by failing to account for trust revenues, using the revenue from trust lands for purposes other than mental health services, and redesignating trust lands as general grant lands. In January 1983, the suit was certified as a class action, and the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska."[4] *Weiss v. State*, 4FA-82-2208, Order Certifying Action (Super. Ct. Jan. 26, 1983) (Judge Taylor). AMHA intervened in 1986 and added claims that

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[3] Legislatively designated areas are lands designated by law as a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range. *See* Ch. 66, §§ 54(6), 55(b), SLA 1991.

[4] The beneficiaries of the trust are composed of at least "those individuals suffering from psychiatric illness who may require hospitalization and the mentally defective and retarded" as well as "chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness." Memorandum Decision and Order, at 17 (April 27, 1988).

the conveyances of trust land to third parties were invalid. In March 1987, Bosel intervened to represent mental defective and mentally retarded individuals. N.L. intervened in June 1987 to represent chronic alcoholics.

In October 1985, the Alaska Supreme Court upheld the superior court's finding that the State breached its trustee obligations under the mental health land trust. *State v. Weiss*, 706 P.2d 681, 684 (Alaska 1985). The Supreme Court also invalidated the 1978 legislation redesignating mental health trust lands as general grant lands and held that, to the extent possible, the trust should be returned to its position prior to the legislation.[5]

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[5] Specifically, the Supreme Court stated:

> It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.
>
> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of the lands sold, the state need not furnish cash as part of the reconstitution. The goal is to

The court specifically declined to rule on questions regarding the title to mental health lands held by third parties.[6] *See Weiss*, 706 P.2d at 684 n.4.

The parties have struggled to agree on an adequate remedy since the Supreme Court decision. Major attempts at settlement were made through legislation in 1987 (Chapter 48), 1990 (Chapter 210), and 1991 (Chapter 66). None of these proposed settlements has obtained preliminary approval.

Chapter 48 involved the concept of the State "renting" mental health lands from the trust. The trust was to be reconstituted entirely with land within legislatively-

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> restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

State v. Weiss, 706 P.2d 681, 684 (Alaska 1985).

[6] This issue was raised in AMHA's complaint after the Supreme court's decision. The plaintiffs and the State disagree on which trust lands have been "sold" within the meaning of the court's opinion. The State contends that any disposition, even designation as a park, means the land has been "sold." Plaintiffs have argued that the term "sold" applies only to land conveyed to bona fide purchasers, which of course would not include municipalities. They contend that this lawsuit was sufficiently well-known that all or nearly all purchasers had at least constructive notice of the trust's interest and the State's breach of trust. *See* Settling Plaintiffs' Memo. Supporting Motion for Preliminary Approval, at 8 (July 1, 1992). Since it is possible that the amount of the State's past mental health expenditures exceed the value of "sold" trust land, it is possible that the trust would not receive any cash reimbursement even if substantial amounts of land were "sold." It is in the interest of the State to maximize the amount of lands "sold" and the amount of past mental health expenditures. It is in the interest of the trust to minimize both categories.

designated areas and the original trust lands not in legislatively-designated areas were to be released from trust status. The reconstituted trust was to have the same fair market value as the original one million acres of mental health lands. The State was to compensate the trust by "renting" the reconstituted trust lands at an annual amount of eight percent of the fair market value of trust lands with the value of the lands to be redetermined every five years. Until fair market value of the lands was established, five percent of the State's unrestricted general fund revenues was deemed to be the income of the trust. Chapter 48 also created an Alaska Mental Health Board to determine the needs of the mental health program and transmit funding recommendations to the governor and legislature.

Chapter 48 failed as a possible settlement because the parties could not determine fair market value of the trust lands. The fair market value of trust lands was estimated according to procedures approved by the Interim Mental Health Trust Commission[7] at $2.243 billion. The State considered this figure much too high. The Commissioner of the Department of Natural Resources wrote to the Alaska Mental Health Board on April 17, 1990, announcing that the department would not follow the procedures. Impasse resulted.

The legislature then enacted a different settlement proposal in Chapter 210, which eliminated the need for a

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[7] The Interim Mental Health Trust Commission was originally established under chapter 132, SLA 1986.

land value determination. Chapter 210 provided for compensation to the trust in the amount of six percent of the State's unrestricted general revenues. Plaintiffs rejected this proposal because State revenues were expected to fall to a level at which the trust was unlikely to receive fair compensation for the value of trust lands. The court held that the legislature could not settle the lawsuit unilaterally with such legislation, particularly in view of the Supreme Court's mandate to reconstitute the trust "to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." Memorandum Decision and Order, at 8-9 (July 9, 1990).

Plaintiffs obtained an injunction prohibiting the State from taking any further action on mental health lands. *See* Memorandum Decision and Order (July 9, 1990). The plaintiffs also filed lis pendens on all original mental health lands. Around 6,000 land transactions were affected by the injunction and/or lis pendens. This placed many purchasers of small parcels in a difficult position: they made all of their payments to the State for land purchased in a state land sale, but were still unable to obtain patent to the land. Because of the cloud on their title, many of these individual purchasers have found themselves unable to sell the land or obtain financing for construction. Certain developments on state land, such as mining operations, also have been delayed due to the uncertainty of title.

In May 1991, after negotiations between the State and class counsel, the Alaska Legislature passed Chapter 66. The legislation contained amendments to the state's mental health program and established a process to select

land for an entirely land-based reconstitution of the mental health land trust. On April 6, 1992, a proposed settlement agreement, incorporating Chapter 66, was signed by the State and three of the four class counsel.[8] Because of H.L.'s allegations of improprieties during negotiations, an evidentiary hearing regarding settlement negotiations was held in September 1992, and continued in January 1993.

The legality of portions of Chapter 66 dealing with reconstitution of the mental health land trust was challenged by the Public Interest Intervenors. The portions of the Chapter 66 settlement affecting Cook Inlet oil and gas leases on state land were challenged by Marathon Oil Company and Union Oil Company of California ("Oil Company Intervenors"). The Public Interest Intervenors' challenge to Chapter 66 was addressed in the court's Memorandum Decision and Order regarding Public Interest Intervenors' Complaint (April 26, 1993). The Oil Company Intervenors' challenge to provisions in the proposed settlement which effected their oil and gas leases on state land in Cook Inlet was addressed in the court's Memorandum Decision and Order (May 14, 1993). Both decisions were appealed.[9]

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[8] Counsel for Bosel, Jeff Jessee, withdrew from the Chapter 66 settlement in December 1992.

[9] If this settlement is approved, the Oil Company Intervenors plan to file motions to the Alaska Supreme Court requesting dismissal of their appeals as moot and vacation of the orders on which the appeals are based. Response of Oil Company Intervenors, at 4 (July 1, 1994).

On October 4, 1993, the court denied a motion made by H.L. and Bosel for partial summary judgment and held that intervening plaintiff class members have the same status as original named plaintiffs and class members. If a settlement receives final approval, all members of the class will be bound by that decision.[10]

On December 30, 1993, the court refused to grant preliminary approval to the Chapter 66 settlement. *See* Memorandum Decision and Order, at 122 (Dec. 30, 1993). The court found that the proposed settlement had serious deficiencies because the agreement permitted any party to terminate the settlement agreement even after final approval and dismissal of this case. *See* Memorandum Decision and Order, at 121 (Dec. 30, 1993).

Negotiations of a new settlement started in January 1994. In a special session following the 1994 legislative session, HB 201 and HB 371 were passed amending Chapter 66 and establishing a new settlement.[11]

The HB 201 settlement includes more cash and less land than the Chapter 66 settlement. It is supported by the State, Bosel, and H.L. It is opposed by Weiss and

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[10] Of course class members who object to a settlement may appeal any decision granting final approval.

[11] HB 201 has became Chapter 5, FSS SLA 1994, and the accompanying appropriations bill, HB 371, became Chapter 6, FSS SLA 1994, after Governor Hickel signed the bills on June 23, 1994. Because the settlement legislation has been called "HB 201" in most of the documents submitted to the court, this memorandum will continue to use the terms "HB 201" and "HB 371."

AMHA. The settlement is supported by the Public Interest Intervenors, who participated in negotiations concerning land to be included in the reconstituted trust. The Oil Company Intervenors support HB 201, but declined to sign the settlement agreement due to a disagreement with the State over provisions relating to attorneys' fees.[12]

The HB 201 settlement is summarized below. Additional information regarding the settlement and the negotiation process will be discussed as it relates to specific issues raised by the factors the court must consider in making the preliminary approval decision.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The settlement components of HB 201 are contained in sections 2 through 9, 12 through 41, 43, 46, 47, 50, and 51. A proposed settlement agreement submitted with H.L.'s Motion for Preliminary Approval has been signed by the State, H.L., and Bosel. Settlement Agreement and Stipulation to Terms of Dismissal (June 10, 1994). HB 201 to a great extent incorporated the Chapter 66 provisions that are designed to improve the mental health program for beneficiaries, but section 39 of HB 201 repeals the trust reconstitution provisions of Chapter 66. HB 201

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[12] The Oil Company Intervenors do not support Section VI, paragraph 4 of the settlement, which states:

> Attorney fees and costs shall be awarded and paid as determined by the court. Paragraph 6(e) requires dismissal of appeals to the Supreme Court because they are moot. The parties request that attorney fees be awarded as if the orders had not been appealed.

Oil Company Intervenors' Response, at 3-4 (July 1, 1994).

reconstituted the trust with a specific land package and a $200 million cash payment. Most of the settlement terms become effective only if this action is dismissed and any appeals are resolved by December 15, 1994.[13] HB 201 §§ 37.

Chapter 66 was a "process" settlement, which set guidelines for choosing the lands for return to the trust; HB 201 is a "product" settlement with lands already selected and a definite amount of money ($200 million) appropriated in HB 371 for the trust fund.[14] Section 40(a) of HB 201 returns approximately 568,000 acres of original trust land to the reconstituted trust and designates approximately 353,000 acres of other state land as substitute trust land to replace original trust land that will not be returned to the trust. The original trust land to be reconstituted into the trust includes approximately 435,000 acres in fee, approximately 55,000 acres of mineral estate, and approximately 78,500 acres of oil and gas interests. *See* Aff. Harry A. Noah (State M/Prelim. Appr., at 3 n.4, Exh. A). Lands returned to the trust will include only the mineral estate or oil and gas interests where the surface has been conveyed to third parties or is within

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[13] The governor may extend the deadline for up to 45 additional days. HB 201 § 47.

[14] Section 1 of HB 371 provides that the Mental Health Trust Fund, established by section 12 of HB 201, is funded by: (1) $33 million from the existing mental health trust income account; (2) $11.7 million from the Department of Natural Resources (DNR) trust income account in the general fund; (3) $25 million from sale of DNR land sale contracts; and (4) $130.3 million from the constitutional budget reserve fund.

legislatively designated areas such as the Matanuska Valley Moose Range. H.L. and Bosel Mem. Sup. M/Prelim. Appr., at 5 (June 10, 1994). Other state land to be transferred includes 111,000 acres in fee,[15] 217,000 acres of mineral estate,[16] and approximately 25,000 acres of oil and gas interests.[17] *See* Aff. Harry A. Noah (State M/Prelim. Appr., at 3 n.5, Exh. A).

The reconstituted land trust will consist of a total of 930,000 acres, the value of which is estimated by H.L. and Bosel to be between $1.0 and $1.1 billion. H.L. and Bosel Mem. Sup. M/Prelim. Appr., at 2, 4, 6-7 (June 10, 1994). Weiss and AMHA estimate the value of the lands to be $560 million. Weiss Opp. to Prelim. Appr., at 6 (July 1, 1994).

A mental health trust fund will be established to receive revenues attributable to the principal of the trust. HB 201 §§ 12-14. As compensation for the original trust lands not returned to the trust, the fund will start with

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[15] Of this "other state land" to be conveyed in fee, approximately 41,000 acres was selected for its surface value, 4,252 acres for timber value, and approximately 65,000 acres for its mineral potential, including approximately 9,077 acres adjacent to the Fort Knox mining project. H.L. M/Prelim. Appr., at 6.

[16] Approximately 116,000 acres of this land is located near Salcha and has been selected by the state but not tentatively approved by the federal government. It is part of a military withdrawal. Unless the military withdrawal is released, it is not likely that this land could be conveyed to the trust in the foreseeable future.

[17] The oil and gas interests are located in the lower Kenai peninsula and lower Susitna Valley.

the $200 million cash payment appropriated in HB 371. The Alaska Permanent Fund Corporation will manage the trust fund. HB 201 §§ 3, 4. HB 201 provides that the "cash principal of the mental health trust fund shall be retained perpetually in the fund for investment by the Alaska Permanent Fund Corporation." HB 201 § 14 (to be codified as AS 37.14.035(a)).

Earnings from the trust fund along with trust land revenues not attributable to principal will be deposited in a mental health trust income account.[18] HB 201 §§ 3, 14, 15. The income account will be administered by the Alaska Mental Health Trust Authority.[19] HB 201 § 16 (to be codified as AS 37.14.039(a)). Money in the trust income account may be used by the Trust Authority for: (1) awarding grants and contracts to ensure an integrated comprehensive mental health program for the state;[20] (2)

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[18] At the end of each fiscal year, the Alaska Permanent Fund Corporation must transfer the net income of the trust fund to the mental health trust income account. HB 201 § 14 (to be codified at AS 37.14.035(b)). In addition, money deposited prior to December 15 in the existing mental health trust income and proceeds account will be deposited in either the income account or trust fund established by HB 201. Settlement Agreement, art. V, sec. 5 (June 10, 1994).

[19] The Alaska Mental Health Trust Authority is created by section 26 of Chapter 66, SLA 1991. A seven-person board of trustees will govern the Trust Authority. Ch. 66 § 26, SLA 1991. Board members must be appointed by the governor and confirmed by the legislature. HB 201 § 24. The board has the duty to preserve and protect the trust corpus under AS 37.14.009, which is added by section 10 of Chapter 66 and amended by section 9 of HB 201.

[20] Section 16 of HB 201 also adds AS 37.14.045, which specifies the terms under which grants and contracts may be added.

obtaining private and federal grants for the above purpose; (3) soliciting gifts, bequests, and contributions for the above purpose; (4) reimbursing the Alaska Permanent Fund Corporation and DNR for the cost of managing trust assets; (5) offsetting the effects of inflation on the trust fund; and (6) meeting the necessary administrative expenses of the Trust Authority. HB 201 § 16 (to be codified as AS 37.14.041(a) and AS 37.14.045). The proposed settlement agreement states directly that the Trust Authority may use the money in the trust income account for these purposes without further legislative appropriation.[21] Settlement Agreement, art. V, sec. 4, at 12 (June 10, 1994). If money in the income account is not needed for the necessary expenses of the state's mental health program, the Trust Authority is required to transfer the money to the unrestricted general fund for other purposes.[22] HB 201 § 16 (to be codified as AS 37.14.041(b).

The governor is required to submit to the legislature a separate appropriations bill limited to the state's integrated comprehensive mental health program and similarly the legislature is required to make appropriations for the mental health program in a separate bill. HB 201 §§ 4, 7. The bill must be accompanied by a report explaining the differences between the appropriations proposed by the governor and the Trust Authority's recommendations for expenditures from the general fund for the state's mental health program. HB 201 § 5. HB 201 also

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[21] It is not known whether this is permissible under the Alaska Constitution.

[22] Such a transfer is permitted by the Enabling Act. P.L. 84-830, § 202(e), 70 Stat. 709 (1956).

provides that if the governor vetoes any appropriations for the mental health program, the governor's veto message must explain the vetoes in light of the Trust Authority's recommendations for expenditures from the general fund for the mental health program. HB 201 § 6.

Under HB 201, the reconstituted land corpus of the trust will be managed by the Department of Natural Resources ("DNR"). HB 201 § 17. Section 17 of HB 201 describes the standards applicable to DNR's management of trust lands:

> (a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).
>
> (b) Subject to (a) of this section, the department
>
> (1) shall manage mental health trust land under those provisions of law applicable to other state land;
>
> (2) may exchange other state land for mental health trust land under the procedures set out in AS 38.50;
>
> (3) may correct errors or omissions in the legal descriptions of mental health trust land.
>
> (c) The commissioner shall adopt regulations under AS 44.62 (Administrative Procedure Act) to implement this section. The regulations adopted under this subsection must, at a minimum, address

(1) maintenance of the trust land base;

(2) management for the benefit of the trust;

(3) management for long-term sustained yield of products from the land; and

(4) management for multiple use of trust land.

Thus, to the extent that trust principles imposed by the Enabling Act do not conflict, general state land law will apply. The regulations which are to be adopted must address the four listed management provisions.[23] HB 201 requires that a separate unit of DNR be established whose responsibility is to manage the trust land.[24] HB 201 § 22. The land management provisions in sections 17-18 and 22 take effect immediately and remain in effect whether or not the settlement is approved by the December 15 deadline. *See* HB 201 §§ 17, 22, 48, 52.

HB 201 purports to confirm and ratify the 1978 redesignation of original trust lands not returned to the reconstituted trust. *See* HB 201 § 41. HB 201 also provides

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[23] These four management principles are derived from a monograph entitled "The School Trust Lands: A Fresh Look at Conventional Wisdom" by Fairfax, Souder, and Goldenman. Exh. B (evidentiary hearing). The article is published at 22 Environmental Law 797.

[24] The proposed settlement agreement requires that during the development of the initial policies and procedures for the separate DNR unit managing trust land, DNR will consult with a transition team of representatives from the beneficiary community. Settlement Agreement, art. V, § 6, at 13-14 (June 10, 1994). Commissioner Noah testified that he is doing so.

the legislature's estimate of the amount for past mental health expenditures. HB 201 § 42.[25]

The improvements to Alaska's mental health program enacted under Chapter 66 are made effective by the settlement provisions of HB 201 with only a few amendments. *See* HB 201 §§ 19-21, 30-36, 37; Ch. 66 § 26-48. The program portion of the Chapter 66 settlement has involved little controversy; most regard the program portion as a valuable addition to state law.

IV. STANDARD FOR PRELIMINARY APPROVAL

Under Alaska Civil Rule 23(e), a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Alaska R. Civ. P. 23(e). Because the Alaska rule is identical to the federal rule, federal cases may provide guidance in its application to the present case. *See State v. Alex*, 646 P.2d 203, 213 (Alaska 1982). The settlement approval process in class actions is composed of four parts: (1) preliminary approval of the settlement by the court; (2) notice to the class; (3) a formal fairness hearing; and (4) final approval by the court. *See Manual for Complex Litigation, Second* § 30.43, at 241 (West 1985) ["*MCL 2d*]". The primary purpose behind court approval of the settlement of a class action is the protection of class members "whose

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[25] This provision becomes important only if this attempt at settlement does not succeed.

rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982).

The standard for preliminary approval includes an inquiry into both the fairness and the adequacy of the proposed settlement. *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1383 (D. Md. 1983). The court must make a preliminary evaluation of the fairness of the proposed settlement agreement by considering whether the proposed settlement:

(1) appears to be the product of serious, informed, noncollusive negotiations;

(2) has no serious deficiencies;

(3) does not improperly grant preferential treatment to class representatives or segments of the class; and

(4) falls within the range of possible approval.

MCL 2d § 30.44, at 241. Preliminary approval is not a finding that the settlement is actually fair, reasonable, and adequate.[26] *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1384 (D. Md. 1983). Final approval of the settlement remains discretionary with the court even after preliminary approval. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *Newberg on Class*

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[26] The settlement must be "fair, adequate, and reasonable" in order to receive final court approval. *E.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *MCL 2d*, § 30.44, at 242 ("The settlement must be fair, reasonable, and adequate under the circumstances.").

Actions, Third Edition § 11.41, at 11-88 (3d ed. December 1992 & Supp. June 1993) [*"Newberg on Class Actions 3d"*]. The purpose of preliminary approval is to ascertain whether there is any reason to expend the time and money to notify class members of the proposed settlement and proceed with a formal fairness hearing. *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980). Notice and a formal fairness hearing would be "futile gestures," if the court did not find the settlement to be within the range of possible approval.[27] *Newberg on Class Actions 3d* § 11.25, at 11-36; *see In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1384 (D. Md. 1983).

The court may only approve or disapprove a settlement agreement. *MCL 2d* § 30.41, at 237. The court may make suggestions for changes, but has no authority to directly amend a settlement. *See Id.* However, "[n]othing prevents the court from receiving successive settlement proposals or from submitting successive settlement proposals to the class for its evaluation." *Newberg on Class Actions 3d* § 11.25, at 11-37 to 11-38.

The burden is on the proponents to show that a proposed settlement should be approved. *See MCL 2d*

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[27] However, where a court rejects a settlement, it "may indicate what modifications would make the settlement acceptable to it." *Little Rock School District v. Pulaski County*, 921 F.2d 1371, 1388 (8th Cir. 1990). If changes for the proposed settlement are suggested in the court's decision, the parties may be able to agree on appropriate changes before notice is given to the class. *See MCL 2d*, § 30.41, at 237 n. 88. If substantial changes are made, the agreement may be resubmitted for preliminary approval, additional notice to the class, and another hearing. *Id.*

§ 30.44, at 241-42; *Newburg on Class Action, Third Edition* § 11.42, at 11-94 (1992).

V. DISCUSSION

A. Is the Proposed Settlement the Product of Serious, Informed, Noncollusive Negotiations?

1. Factual background

On December 30, 1993, the court denied motions for preliminary approval for the Chapter 66 settlement. As early as January 6, 1994, the State began exploring the possibility of a new settlement. After a January 25, 1994 meeting, Mr. Volland believed that a mixed land and cash settlement was possible.[28] Aff. Volland ¶ 6.

The State presented plaintiffs with an initial offer in mid-February. The plaintiff groups and third-party intervenors discussed the State's proposal several times. The State invited counterproposals from any of the plaintiff attorneys. On March 14, Mr. Volland submitted a counteroffer to the State that involved the formation of a permanent endowment fund for the state's mental health program. *See* Aff. Volland ¶ 14. Although Mr. Volland submitted the counteroffer on behalf of his clients alone, meetings with counsel and representatives for other plaintiff groups convinced him that the principles of his counteroffer were generally acceptable to plaintiff

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[28] The Chapter 66 settlement was a land-based settlement without any significant cash component. The State refused to consider a settlement with a large cash component during the negotiations which led to the enactment of Chapter 66.

groups. Aff. Volland, ¶¶ 14-16. Neither Mr. Walker nor Mr. Gottstein presented a counteroffer to the State.

Mr. Volland involved other interest groups in the negotiations. The Public Interest Intervenors played an active role in negotiating the contents of the list of lands to be included in the reconstituted trust under HB 201. Public Interest Intervenors' Response, at 4 (July 1, 1994). Representatives from the coal industry and oil and gas industry were also involved in the negotiation process. Mr. Volland sought to involve affected parties so that if a settlement was reached, it would be accepted broadly and would not suffer the attacks from non-parties which plagued the Chapter 66 settlement.

A series of meetings ensued among the State, plaintiffs' attorneys, and attorneys for third-party intervenors. *See* Aff. Volland, ¶¶ 16-19 (filed June 10, 1994); Aff. Harry Noah, ¶¶ 5-6 (filed June 10, 1994); Aff. Brian Bjorkquist, ¶ 7 (filed June 10, 1994). By March, negotiations over land focused on identifying lands from those which had been proposed as substitute lands during the Chapter 66 settlement implementation which would also satisfy the concerns of the Public Interest Intervenors. Aff. Volland, ¶ 16. Negotiations also dealt with the desire of Weiss and AMHA to expand the list of returnable original trust lands. *Id.*

Numerous meetings between the various parties occurred, primarily to negotiate land issues. *See* Aff. Volland, ¶¶ 18-20. On April 15, the State responded to the

counterproposal with additional changes, including management of trust land by DNR. Aff. Volland ¶ 20. Discussions during mid-April also appear to have frequently involved the cash endowment. Aff. Volland. ¶ 21-23.

Mr. Volland apparently interpreted a letter sent to him by Mr. Gottstein dated April 19th as supporting his counterproposal and authorizing him to pursue settlement on those terms. *See* Aff. Volland ¶ 21. On the other hand, Mr. Gottstein viewed the letter as confirming an actual agreement between plaintiffs' counsel made at a previous meeting. *See* Aff. Gottstein, at ¶ 9, Exh. A (filed July 1, 1994); H.L. M/Prelim. Appr., Exh. D (June 10, 1994).

On April 25, Mr. Volland attended a meeting with representatives of beneficiaries; they were generally supportive of the proposal with the exception of certain land management provisions. Aff. Volland ¶ 25. Around April 22, Mr. Walker and Mr. Gottstein announced they would not recommend the proposed settlement to their clients. Aff. Volland, ¶ 24.

Because all counsel for the plaintiffs did not agree to the basic terms of the settlement, the State was unwilling to completely abandon its pursuit of an independent legislative resolution of the litigation. Aff. Volland, ¶ 27. For this reason, HB 201 has different effective dates and conditions for the various provisions. As a result of efforts by counsel for Weiss and AMHA, last minute amendments to the bill included section 47, which permits the governor to extend the December 15th deadline by 45 days if the extension is made by November 30, 1994.

Between late January and the final negotiations for HB 201 in May, plaintiffs' counsel held several meetings with members of the mental health community to discuss the settlement proposal. Although not all settlement negotiation sessions were attended by all counsel, counsel for all plaintiffs and third parties were kept informed about negotiations and were invited to attend sessions appropriate to their interests. There have been no allegations of exclusion from negotiations.

2. Serious, informed, noncollusive negotiations

In order to warrant preliminary approval, settlement negotiations must be serious, informed, and noncollusive. *MCL 2d* § 30.44, at 241. Weiss and AMHA concede that "the negotiations were conducted seriously by all parties in the sense that everyone worked very hard at it" and H.L and Bosel "were earnest negotiators." Weiss Opp. to Prelim. Appr., at 8. However, Weiss and AMHA assert that this proposed settlement was not the product of serious, informed, noncollusive negotiations.

Weiss and AMHA assert that the negotiations were not serious because (1) Bosel and H.L. did not pay appropriate attention to detail, and (2) the State insisted on pursuing its legislation to attempt to improve its litigation position.[29] The court disagrees. The court finds that

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[29] HB 201 contains many provisions designed to assist the State in litigation. Section 1 contains a long list of legislative findings which essentially set out the State's litigation posture. The non-settlement provisions would reconstitute the mental health land trust with certain original mental health trust lands

Bosel and H.L. paid attention to detail. Mr. Volland carefully considered the proposals made by Mr. Walker and Mr. Gottstein. Except where he disagreed with the analysis, Mr. Volland actively attempted to include their suggestions in the ultimate product. He was not always successful. However, the essential characteristic of negotiation and settlement is that everyone makes some concessions and no one gets everything desired. The State's insistence on pursuing the non-settlement provisions of HB 201 does not mean the negotiations were not serious. When it was apparent that not all of the plaintiffs' attorneys were willing to enter into the agreement, the State recognized that final approval could be denied. The State went forward with its contingency plan. The State submitted the first settlement proposal in February and later responded to plaintiffs' counterproposal. While parts of the legislation obviously were intended to pressure plaintiffs to agree to a settlement and to discourage challenges to the settlement agreement and appeals from approval if obtained, this does not mean the State was not serious in negotiations.

Weiss and AMHA assert that attorneys for H.L. and Bosel were not sufficiently informed about land issues to the extent necessary to negotiate the complex land issues in the interest of the class. Weiss and AMHA assert that Mr. Gottstein is the most knowledgeable about land

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and substitute lands (the same lands as those in the settlement), and declare a set-off of $1.32 billion from 1978 to 1994. HB 201 §§ 40-42. If valid, the result of litigation would be reconstitution of the trust with the same lands contained in this settlement. There would be no other benefits to the class and no cash component for the fund.

issues among plaintiffs' attorneys. They argue that Mr. Volland and Mr. Jessee used improper valuation numbers in evaluating the proposal. They argue that it was error to include 116,000 acres in the Salcha area that has only been selected by the State and is subject to a military withdrawal. They argue that the failure to include favorable terms from the Chapter 66 settlement such as survey at state expense and warranty of title demonstrate that counsel were not sufficiently informed.

The court disagrees and finds that Mr. Volland and Mr. Jessee were sufficiently informed. It is true that they do not have the most experience in these land issues among plaintiffs' attorneys. However, they did not operate in a vacuum. They made extensive use of the expertise found in the Mental Health Trust Lands Project.[30] The vast majority of lands to be included in the reconstituted trust under this proposed settlement agreement were lands proposed for inclusion in the reconstituted trust under the Chapter 66 proposed settlement by Weiss and AMHA.[31] Moreover, all attorneys, including Mr. Gottstein, were involved in the negotiation of the land list for this proposed settlement. The questioned values were ones supplied by the Lands Project; they were not ones

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[30] The Mental Health Trust Lands Project was established by Mr. Walker and Mr. Gottstein for implementation of the Chapter 66 settlement. The Project had many land experts employed. It also contracted with other experts.

[31] Of the land types listed in Exhibit A (evidentiary hearing) to be in the trust only four categories were not substitute lands proposed by the Lands Project under Chapter 66 implementation. They total one percent of estimated value.

developed by Mr. Volland or Mr. Jessee. Finally, no agreement of this magnitude is perfect and in settlement no one gets everything desired. The court does not believe that any purported "errors" were the result of counsel not being informed.[32]

Counsel for Weiss and AMHA contend there are indications of collusion between the State and counsel for H.L. and Bosel. Weiss Opp. to Prelim. Appr., at 11. They

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[32] It is true that the inclusion of the 116,000 acre Salcha parcel is problematic. At least part of the problem was recognized in the proposed settlement agreement. The provision states:

> d. Replacement of Mineral Estate Only Parcel from "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994"
>
> The State and beneficiary plaintiffs who are parties to the Settlement Agreement shall by August 1, 1994, identify for purposes of replacing land, an area of mineral estate only land at least equal in acreage and at least equal in revenue generating capability (i.e. estimated mineral value) to the land to be replaced within portion(s) of the approximate 116,000 acre Salcha mineral estate only parcel F-82863 (with errors or omissions in the legal description, if any, corrected) listed in "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994" that are now known to be contaminated with or affected by hazardous substances, (i.e. the Stewart Creek Impact Zone, which is generally identified on the map attached as Exhibit 2), unless otherwise agreed to by the parties. The parties shall also attempt to minimize the impact, if any, the replacement of land may have on the development potential of the Salcha mineral estate only parcel F-82863.

Attachment B to Settlement Agreement, at 1 (June 10, 1994).

contend that counsel for H.L. and Bosel violated an agreement with counsel for Weiss and AMHA set out in Mr. Gottstein's letter of April 19. Aff. Walker, ¶¶ 132-34 and Exh. 36 (filed July 1, 1994). They assert that counsel for H.L. and Bosel gave up the requirement of adequate funding from the general fund for the mental health program and then negotiated away the "endowment concept" for the trust. They assert that supporting legislation with the December 15 deadline is collusive, especially in light of the known constitutional issue regarding the Trust Authority's ability to spend the income of the trust without further legislative authorization.[33] They assert that the negotiation of a "confusing" agreement is further evidence of collusion.

The court disagrees and finds that the agreement is not the product of collusion. The court finds that the attorneys had legitimate disagreements over the interpretation of their April agreements. The court finds that counsel for Bosel and H.L. negotiated in good faith with the interests of the class in mind. Moreover, counsel for Weiss and AMHA were free to negotiate directly with the State throughout the process. There can be disagreement about the result, but the process was fair and non-collusive.

In summary, the court concludes that the proposed settlement is the product of serious, informed, noncollusive negotiations.

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[33] The point is that the deadline precludes testing the constitutionality of the Trust Authority's power in the Alaska Supreme Court.

B. Is the Proposed Settlement Without Serious Deficiencies?

Weiss and AMHA have raised seven points which they assert are serious deficiencies which should preclude preliminary approval: (1) termination by appeal; (2) unenforceability of the settlement; (3) indefinite terms; (4) invalidity of the land lists; (5) difficulties with DNR's work; (6) illegality of the management regime; and (7) lack of effective control by the Trust Authority. Each issue will be discussed.

The settlement provisions of HB 201 and HB 371 are effective only if the December 15 deadline is attained for dismissal of this action and the conclusion of all appeals. HB 201 §§ 37, 48-51. The proposed settlement agreement provides that if this court dismisses this action after final approval of the settlement, but the deadline is missed because of an appeal, any party can seek relief under Alaska Civil Rule 60(b)(6). Moreover, the parties have agreed that "the failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment and no party shall oppose such a motion." Settlement Agreement, art. VI, sec. 7, at 17 (June 10, 1994). Weiss and AMHA argue that any party's ability to terminate the agreement by filing an appeal is a serious deficiency.

The court agrees that the effect of appeal on the settlement provisions is problematic. In essence, despite the investment of many hours and significant money by everyone in the approval process, any party can destroy the settlement by filing an appeal from a grant of final

approval.[34] Nevertheless, the court does not see this as a problem sufficient to warrant denial of preliminary approval. Although time and money will be wasted if the process fails because of a missed deadline, the claims of the class will not be adversely impacted. They will be in the same position that they would be if preliminary approval was denied. Moreover, if the settlement fails for this reason, it will be known soon – no later than the end of January 1995. The lost time should not adversely impact the class or its claims.

Weiss and AMHA's second point relates to the enforcement of the settlement. They question the enforceability of three aspects of settlement: (1) the "endowment concept";[35] (2) correction of land list problems; and (3) the payment of the $200 million to the trust, especially the $25 million designated to come from the sale of DNR's land sale contract portfolio [*see* HB 371 § 1(a)].

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[34] The parties favoring settlement informed the court at the evidentiary hearing that they are looking for a solution to the problem. However, the court doubts a solution can be found. Assuming the court issues and distributes a decision granting final approval on the date scheduled (November 15), a dissenter could wait until December 15 to file a notice of appeal. Even if the governor had opted for the permissible 45 day extension of the deadline, the Supreme Court would have only 45 days to act. There are few cases in the history of the state which have been decided within 45 days of the date the notice of appeal was filed.

[35] The court understands this term as used here to mean a Trust Authority with freedom to spend trust income without legislative approval.

It is true that there is no guarantee in this proposed settlement that the Trust Authority's power or, indeed, its existence will not be changed by a future legislature. It is important to focus on what remedy is provided if the legislature makes a material change in the provisions of HB 201 which create the Trust Authority. The portions of HB 201 which create the Trust Authority are incorporated into the proposed settlement agreement.[36] Settlement Agreement, art. I, sec. 1. If the legislative change was material, the class would be entitled to invoke the remedy found in art. VI, sec. 5: they would be free to file a new action asserting all the claims they have today.[37] While there are no guarantees, the fact that this litigation would begin anew should provide a reason for future legislatures not to act detrimentally to the class. There are risks associated with this which should be analyzed by the class; the court does not believe the risks are so great so as to require denial of preliminary approval.

Weiss and AMHA point out that there are known and identified problems with the land list to reconstitute the trust adopted by the legislature in HB 201. They assert that those problems can only be corrected with legislation. Since no one can say what the legislature will do, there are no guarantees that the changes will be made.

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[36] The Settlement Agreement does not use the word "incorporate." However, at the evidentiary hearing, the court ensured that incorporation was the intent of the agreement.

[37] The court ensured at oral argument that it was the State's intent that if there was a material change, the class would have all claims they have today and would be free to assert them.

The State acknowledges that some of the identified problems may require new legislation to correct.

Exhibit 2 to the Wareham affidavit (filed 7/1/94) lists many "errors and omissions" in the land lists on which the settlement is based. Some of the problems are serious, *e.g.*, the 116,000 acre parcel near Salcha which is not likely to be conveyed, other problems are insignificant, *e.g.*, listing a parcel on both the conveyable list and the non-conveyable list.[38] There are certainly a number of technical corrections which need to be made; it is possible that many will require new legislation. Some errors may be corrected under DNR's authority to exchange trust land with other state land and to "correct errors or omissions in the legal descriptions of mental health trust land." HB 201 § 17 (to be codified as AS 38.05.801(b)(2) and (3)).[39]

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[38] The court views this as insignificant because the list that controls should be the conveyance list.

[39] Article III of the Proposed Settlement Agreement provides a process for correction of technical problems with the lands list:

> 1. The parties agree that any omissions, overinclusions, inconsistencies or errors now known or discovered in the list of original and substitute trust lands transferred to the trust pursuant to Sections 40(a)(1) & (2) of HB 201 shall be resolved as follows:
>
> (a) The State and the plaintiffs, and the State and the Trust Authority, once established, shall identify to the other party any omissions, overinclusions, inconsistencies or errors in the lists of original and substitute trust lands as soon as such problems are known or discovered, along with such information or other explanation as is necessary to determine the reason for the claimed omission or

However, it is likely that not all problems can be corrected without new legislation.

The court views this as a problem. It is essential that the beneficiaries obtain the benefit of their bargain. The beneficiaries are not assured of the benefit of the bargain if they are dependent on an act of a future legislature. The parties favoring settlement have advised the court that they are looking for a solution. The court believes they should have an opportunity to find one. If they have not found a solution by the time of the final approval hearing, the court (and the beneficiaries) will be forced to examine the degree of risk posed by the problem and the

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error.

(b) Any errors or omissions to the legal descriptions of the lists of original and substitute lands submitted pursuant to Sections 40(a)(1) & (2) of HB 201 necessary to accomplish the intent of the parties shall be corrected by the Department of Natural Resources (DNR) pursuant to the authority granted DNR under Sec. 17 of HB 201.

(c) Any additions, deletions, or substitutions to the list of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1) & (2) necessary to accomplish the intent of the parties shall be obtained by legislative amendment or by transfer, exchange, or conveyance.

(d) As of the date of executing this agreement, the parties have identified in *Attachment B* the initial omissions, overinclusions, or substitutions to the lists of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1) & (2) which they agree to correct pursuant to the terms of (b) and (c) above.

Settlement Agreement, at 5-6.

impact on the settlement if no solution is found.[40] However, the court will not deny preliminary approval on this basis.

The final enforcement issue raised by Weiss and AMHA relates to the enforceability of the "promise to pay the $200 million." Weiss Opp. at 17 (filed July 1, 1994). Weiss and AMHA argue that unless the full $200 million is in the trust fund at the time of dismissal, the State's promise to pay is unenforceable under article IX, and section 13 of the Alaska Constitution. Weiss Opp. at 17. The constitutional provision states:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Alaska Const., art. IX, § 13.

HB 371 appropriated $200 million to the "mental health trust fund" from these sources in these amounts:

Mental health trust income account balance on 6/30/95	$ 33 million
DNR – mental health trust income in the general fund	$11.7 million

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[40] It is certainly possible that failure to find a solution to the problem associated with the Salcha property could lead to non-approval. The acreage is large – 116,000 acres, over 10% of the reconstituted trust acreage. The court does not know the value of the parcel, but assumes it may also be significant.

Proceeds from sale of DNR land sale contracts portfolio	$ 25 million
Budget reserve fund	$130.3 million

These funds were appropriated. Moreover, section 1(e) of HB 371 provides that the appropriations "do not lapse." Thus, the only way the fund would not receive the sums is if they do not exist. The only item whose future existence is questioned is the proceeds from DNR land sale contract portfolio. DNR is currently in the beginning stages of offering the portfolio for sale. Commissioner Noah has recently begun inquiries regarding other sources of revenue to replace this item if it is unavailable. The court views the possible unavailability of the $25 million as a problem. However, there is a reasonable probability that it will be resolved by the time of final approval. If it is not resolved, the court and class members will have to evaluate the agreement in that light. The court does not find the problem to be a deficiency which precludes granting preliminary approval, but it may be an issue for consideration at final approval.

The third "serious deficiency" argued by Weiss and AMHA relates to their criticism that the proposed settlement agreement "is very unclear as to very critical terms." The court disagrees. To the extent that important issues were highlighted at the evidentiary hearing, the questions of interpretation were resolved by ascertaining the intent of the parties.[41] In light of the fact that the

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[41] Specifically, the State stated its intent was (1) that the trust would not be charged for access to state land; (2) that it intended that the settlement provisions of HB 201 were

assumed ambiguities were resolved in the beneficiaries' favor, there is no risk to the class from them.

Weiss and AMHA next assert that the land lists are of "questionable validity." Weiss Opp. at 18 (filed July 1, 1994). The claim is made that the land lists do not identify the boundaries of a large number of parcels. Admittedly, the lists do not contain legal descriptions. The court does not find that to be a serious deficiency. The court expects further evidence if the parties actually believe that approval should be denied on this basis.

Weiss and AMHA assert that "DNR is unlikely to accomplish the required land work accurately or in a timely manner." Weiss Opp. at 19 (filed July 1, 1994). This argument is not supported by any admissible evidence.[42] At this point it would be mere speculation to conclude that DNR cannot do the job it is required to do.

Weiss and AMHA argue that the management regime under the proposed settlement is illegal. They assert that the settlement would have to have the standard that the trust be "managed solely in the best interests of the beneficiaries under private trust law principles." Weiss Opp. at 20 (filed July 1, 1994).

HB 201 requires that trust land be "managed consistent with the trust principles imposed on the state by the

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incorporated into the agreement; and (3) that if the remedy provisions of art. VI, sec. 5 were invoked, the plaintiffs could reassert all claims they have today.

[42] The opposition referred to the affidavit of Ms. Hayes, which was struck because she was unavailable for cross-examination.

[Enabling Act]," but specific trust management standards are not specified in either HB 201 or the proposed settlement agreement. HB 201 § 17. To the extent not inconsistent with the Enabling Act, the trust lands are subject to the same provisions of law applicable to other state lands. *Id.* HB 201 requires DNR to adopt management regulations which must address at least four management principles:

> (1) maintenance of the trust land base;
>
> (2) management for the benefit of the trust;
>
> (3) management for long-term sustained yield of products from the land; and
>
> (4) management for multiple use of trust land.

HB 201 § 17 (to be codified as AS 38.05.801(c)).[43] DNR is required to consult with the trust authority before adopting regulations under AS 38.05.801(c). HB 201 § 9 (to be codified as AS 37.14.009(a)).

The statute and agreement are intentionally vague on the issue of the required management standard. In order to assure the support of the environmental and resource industry interest groups, language acceptable to all was adopted. The battle, if there is to be one, was reserved for the regulatory process. It is important that the class understand that it may require more litigation to ensure

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[43] These standards were pronoted by Mr. Volland based on the article by Fairfax, *et al.* discussed earlier. If there is legislative history to the effect that the Fairfax article was considered by the *Legislature*, the court's concerns about the standards would be greatly alleviated.

that regulations actually comply with the Enabling Act. Of course, it is possible that DNR will adopt regulations that satisfy the Act. It is also possible that all interest groups can be accommodated in the regulatory process. However, there are risks of future litigation presented by this approach.

The court disagrees with Weiss and AMHA regarding the illegality of the standard. What the class is entitled to is management under the requirements of the Enabling Act. This legislation cannot diminish those requirements because of the supremacy of federal law; this statute does not purport to diminish those requirements. If the Enabling Act requires management solely in the interest of the beneficiaries and under private trust principles, HB 201 does not displace that standard. The treatment of the issue in the settlement means that it may require further litigation to achieve the result. The court does not believe this is a serious deficiency. It is an issue which the class and court must analyze in final approval.

Finally, Weiss and AMHA argue that "lack of effective control of trust management by the Trust Authority is a serious deficiency." Weiss Opp. at 20 (filed July 1, 1994). Essentially, they argue that DNR management of trust lands without more control and supervisory authority by the Trust Authority results in a serious deficiency.

The court agrees with Weiss and AMHA that DNR's past trust management has been substandard. DNR generally has managed the lands as if there was no mental health lands trust and as if DNR had no fiduciary obligations to the beneficiaries of the trust. However, there are

certain factors which indicate that past behavior may not be the best indicator of the future.

HB 201 requires DNR to establish a separate trust management unit to manage the reconstituted mental health trust lands. Personnel in the separate trust unit will be applying only trust management principles and working under one set of policies and regulations. Management of trust land through this separate unit should make DNR more cognizant of its fiduciary responsibilities with regard to trust lands.

Commissioner Noah has acknowledged that with or without settlement DNR must change its management of trust lands. For the first time in the court's memory, someone in authority in DNR has acknowledged DNR's fiduciary obligations toward the trust regardless of this litigation and that DNR has not met those obligations in the past. To the extent that acknowledgement is the first step to cure, this is a hopeful sign.

The court concludes that this is not a serious deficiency in the settlement. It may be a concern for the class, but it does not automatically bar approval in the court's analysis. First, the court sees the hopeful signs noted. Second, if this case goes to litigation, the class will likely have DNR management of trust land.[44]

The court has also examined the settlement for serious deficiencies. None has been found.

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[44] It is possible that the "trustee" could be removed. However, the court is not aware of any instance where the trustee of a public land trust has been removed by a court.

For these reasons, the court concludes that the settlement does not have serious deficiencies which would preclude preliminary approval.

C. Is the Proposed Settlement without Improper Preferential Treatment of Segments of the Class?

The program portion of the settlement has changed little since the Chapter 66 proposal, and the court previously found no preferential treatment in that settlement. *See* Memorandum Decision and Order at 103-07 (Dec. 30, 1993). The program priorities in Chapter 66 do not favor any of the four major subgroups within the class. Memorandum Decision and Order at 104 (Dec. 30, 1993). No funds will be distributed directly to class representatives or other class members. The trust will be managed for the benefit of all trust beneficiaries.

Disparate treatment is possible, although not probable, under the HB 201 funding scheme. H.L. and Bosel expect the grants and contracts issued directly by the Trust Authority using money from the trust income account to fund services or programs which supplement the state's basic mental health program rather than for the basic program itself. *See* H.L. M/Prelim. Appr., at 19, 23. Assuming that to be true, if membership on the board of trustees of the trust authority becomes unbalanced, it is possible that some beneficiary groups might receive preferential treatment. However, this is mere speculation. A balanced membership within the Trust Authority's board of trustees should result in a balanced distribution

among beneficiary groups of money from the trust income account.[45]

The court concludes that the proposed settlement does not contain any preferential treatment of a segment of the class to an extent that would preclude preliminary approval.

D. Does the Proposed Settlement Fall within the Range of Possible Approval?

There is no purpose in sending notice of a proposed settlement to the class if it does not appear preliminarily to be within the range of approval. *Liebman v. J.W. Petersen Coal & Oil Co.*, 73 F.R.D. 531, 535 (N.D. Ill. 1973). In order to determine whether a settlement is within the range of possible approval, the court must make a preliminary evaluation based on the general standards for final approval of "fairness" and "adequacy" within the unique context of preliminary approval. *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1383-85 (D. Md. 1983). Final approval requires a finding that the settlement as a whole is "fair, adequate, and reasonable." *Class Plaintiffs v. City of Seattle*, 955 F.2d at 1291; *Newberg on*

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[45] Weiss and AMHA argue that the Trust Authority could spend trust income for the benefit of someone other than the beneficiaries. The court concludes that the money could only be spent in furtherance of the integrated comprehensive mental health program and, thus, that is not legally possible. *See* HB 201 § 16 (to be codified as AS 37.14.041(a)(1) and AS 37.14.045(a)). As well, the Trust Authority has the duty to deal with trust beneficiaries impartially. HB 201 § 8 (to be codified as AS 37.14.007(b)(12)).

Class Actions 3d § 11.41, at 11-91; *MCL 2d* § 30.44, at 242. However, a "settlement need not provide the best or speediest relief imaginable to be fair, adequate, and reasonable." *Officers for Justice*, 688 F.2d at 636; *see also* 2 H. Newberg, *Newberg on Class Actions, Second* § 11.45, at 460-61 (2d ed. 1985 & Supp. 1992) ("[a] settlement does not have to be a brilliant one in order to secure judicial approval").

The most important factor in evaluating fairness is a comparison between the likely result of litigation and the remedy provided in the settlement. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14, 67 L.Ed.2d 59, 67 n.14 (1981); *Armstrong*, 616 F.2d at 314; *Newberg on Class Actions 3d* § 11.41, at 11-93 to 11-94; *MCL 2d*, § 30.44, at 242 ("whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued"). Other factors the court may consider in final approval include:

(1) Expense, complexity, and likely duration of further litigation;

(2) Extent of discovery completed;

(3) Experience and views of counsel;

(4) Amount of opposition to the settlement;

(5) Defendant's ability to pay (what constitutes a feasible remedy);

(6) Presence of collusion in reaching a settlement.

Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; *Armstrong*, 616 F.2d at 314; *Newberg on Class Actions 3d* § 11.43, at 11-97. The court also must consider whether the interests of the class were adequately represented by the

named plaintiffs and counsel. *Malchman v. Davis*, 706 F.2d 426, 433 (2nd Cir. 1983). The relative importance of the various factors depends upon the nature of the claims, type of relief sought, and the unique circumstances of an individual case. *Class Plaintiffs v. City of Seattle*, 955 F.2d at 1291; *Officers of Justice*, 688 F.2d at 625. In evaluating the fairness of a settlement, the court as well as the parties must remember that "compromise is the essence of a settlement." *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *Cotton*, 559 F.2d at 1330. A settlement may compromise some potential remedies available to the class, if as a whole the settlement is fair, reasonable, and adequate. *Armstrong*, 616 F.2d at 315, 317.

Although this is only the preliminary approval stage, it is useful to examine whether the agreement is within the range of acceptable results, considering those factors that would be examined at the final approval stage.

1. Comparison with further litigation

The HB 201 settlement would reconstitute the trust with land in the form of 550,000 acres in fee and 378,000 acres of subsurface estate plus $200 million cash.

The agreement purports to require most of the land to be conveyed to the trust authority prior to final approval of the settlement.[46] Settlement Agreement, art.

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[46] The proposed settlement agreement provides:

1. *Transfer of Land by Quitclaim Deed And Delivery of Conveyances.* Land and interests in land conveyed to the Trust Authority shall be granted in trust to the

IV, § 1, at 6-7. The proposed settlement agreement states that prior to dismissal of the action, the State will tender to the court the deeds for conveying the listed state lands to the Trust Authority.[47] Settlement Agreement, art. IV, § 1, at 6-7.

> "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Sections 40(a)(1) & (2). Upon approval of this settlement by the court and dismissal of this action, the deeds shall be placed in escrow for delivery to the Authority upon its request. The parties recognize that certain of these deeds will use parcel numbers which reference the State maps that describe the lands in *Attachment A* in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the authority to complete the preparation of recordable deeds for delivery to the Authority as soon as practicable after dismissal.

Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994).

[47] The conveyances from DNR to the Trust Authority probably will not be complete before the case is dismissed under the present compressed schedule. *See* Weiss Opp. at 19. The HB 201 settlement agreement acknowledges that full legal descriptions may not be available at the time the deeds are tendered to the court. Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994). Some parcels are likely to be described only with parcel numbers corresponding to numbered parcels on DNR maps. *Id.* The State "agrees to use its best efforts and to work with the [Trust] Authority to complete the preparation of

Mental health trust land selections not yet conveyed to the State by the federal government will be conveyed as the State receives them. DNR will consult the Trust Authority when it determines the annual conveyance priorities submitted to the Bureau of Land Management. Settlement Agreement, art. IV, § 9, at 11 (June 10, 1994). In addition, if the land parcels eventually conveyed to the State from the federal government are different from those described on the lists referenced in HB 201, the State will compensate the trust with other land of a similar character, equal value, and similar revenue-producing potential. Settlement Agreement, art. IV, § 2 (June 10, 1994).

The Settlement Agreement contains no provision to compensate the trust for encumbrances that are inconsistent with the revenue-producing mandate of the trust. Settlement Agreement, art. IV, § 3, at 8 (June 10, 1994). The State will bear the recording costs for all documents required by the agreement, but there is no requirement that the State pay surveying costs. *See* Settlement Agreement, art. IV, § 5 (June 10, 1994). Costs could be quite high for surveying parcel boundaries, easements, and other encumbrances. The Trust Authority will obtain quitclaim deeds only, but in the settlement agreement the State warranted that "it has the legal authorization necessary to convey the land or interest in land" for lands to be conveyed. Settlement Agreement, art. IV, sec. 2, at 7 (6/10/94). The agreement provides for compensation with other land if the warranty is violated. *Id.*

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recordable deeds for delivery to the Authority as soon as practicable after dismissal." Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994).

An appropriation bill, HB 371, has already been passed to fund the $200 million payment into the trust fund created by section 12 of HB 201. This monetary corpus will be managed by the Alaska Permanent Fund Corporation, which has demonstrated acceptable management of the permanent fund for the state's oil revenues. Income from investment of the trust fund will provide some trust revenue even without land development. Thus, at least some income stream is assured from the beginning for the Trust Authority's use in making grants and contracts under section 16 of HB 201.

In addition, the HB 201 settlement includes the program improvements contained in the Chapter 66 settlement with few changes.[48] A Trust Authority would be created whose duties include ensuring that trust assets are managed consistent with the Enabling Act [HB 201 § 9]. The Trust Authority's purpose is to ensure an integrated comprehensive mental health program. The Trust Authority would have the power to spend income from the trust without further legislation.[49] The Trust Authority must develop a budget for the integrated comprehensive mental health program. HB 201 § 27 (to be codified as AS 47.30.046(a)).

HB 201 strengthens the budgeting process for the mental health program. First, a budget for general fund

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[48] The program improvements contained in Chapter 66 will be repealed automatically if the deadline for dismissal is not met. *See* HB 201 § 48.

[49] The class should be aware that this provision may not withstand a constitutional challenge should one be raised. It is a risk to be evaluated by the class.

appropriations is prepared by the Trust Authority as noted above. Second, if the governor's appropriations bill for funding the mental health program differs from the Trust Authority's budget, the governor must provide a report which explains the reasons for the differences. HB 201 § 5 (to be codified as AS 37.14.003(b)). Third, in the event of a veto of an appropriation, the governor must explain the veto in light of the Trust Authority's recommendations. HB 201 § 6 (to be codified as AS 37.14.003(c)). Fourth, appropriations for the mental health program must be made in a separate bill limited only to those appropriations. HB 201 § 7 (to be codified as AS 37.14.005(b)). Fifth, the legislature must issue a report explaining any differences between the Trust Authority's recommended general fund budget and the appropriation bill passed. *Id.* at AS 37.14.005(c).

In summary, the proposed settlement would provide: (1) reconstitution of the trust with some original mental health trust lands, some substitute lands, and $200 million; (2) program improvements; (3) the Trust Authority; and (4) budget process advantages.

Litigation results are, of course, unknown. However, it is very clear that program improvements, the Trust Authority, and budget process advantages could not be obtained through litigation.[50]

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[50] It is possible that the court could order that DNR be removed as trustee of the lands. However, it is unclear what trustee would be appointed. Moreover, it would be an extraordinary act to remove a trustee of a public trust named by the Congress.

It is difficult to compare the results of litigation versus the settlement results with respect to the trust corpus. The task is difficult in part because of the difficulties of assessing litigation risk for lands to be returned to the trust, and more importantly, because of problems with valuation. The court will analyze the issues from various perspectives.

If HB 201 is valid, the result of further litigation is clear. The trust would be reconstituted with exactly the same lands as those in the settlement. The trust would be managed by DNR. The class would not receive the other benefits of the settlement: $200 million, the Trust Authority, the program enhancements and the budget advantages. If HB 201 is valid, it is clear that the class would benefit from the settlement. However, this court has once before questioned the legislature's ability to settle the case unilaterally. *See* Memorandum Decision and Order Re: Preliminary Injunction, at 8-9 (July 10, 1990). Therefore, it is also important to look at results of litigation if HB 201 is not valid.

In a best-case scenario, in litigation the trust would be reconstituted with all of the original mental health trust lands. DNR would manage the trust, unless removed as trustee by the court. There would be no warranty of title or survey beyond that done before federal patent.[51] If the plaintiffs succeeded in having all the original trust lands returned to the trust, the trust would

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[51] The court understands the surveys to have been large "four-corners" surveys.

not receive any cash compensation.[52] The best-case scenario is not very likely because it is likely that some of the original land would be classified as "sold."

In a worst-case scenario, in litigation the trust would receive the original mental health lands that are undisputedly not "sold." It is entirely possible, if not likely, that there would be no cash component.[53] This worst-case scenario would not occur unless HB 201 was declared invalid.

The court concludes that the likely result is somewhere between the best and worst-case scenarios. It is likely that some of the lands which the State maintains have been "sold,"[54] would not be returned to the trust. It is also likely that the set-off would be large enough that

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[52] The State has to pay cash only to reimburse the trust for original trust lands "sold" by the State after the 1978 legislation. *See Weiss v. State*, 706 P.2d at 684. This scenario hypothesizes that no land would be classified as "sold."

[53] The court's analysis is that it is likely that the State's set-off will exceed the value of lands which the court determines were "sold." In order for the trust to receive cash as a result of litigation, the value of the lands "sold" would have to be more than the State's set-off for expenditures on the mental health program since 1978. *See Weiss v. State*, 706 P.2d at 684. The State has expended a substantial sum of money on the mental health program since 1978, though the parties dispute what sums should be included. In HB 201, the legislature set the amount at more than $1.3 billion. The most generous estimates of value of the *entire* original mental health trust lands are in the range of $1.9 – 2.0 billion.

[54] The State maintains that sales to third-party purchasers, the Cook Inlet Regional Corporation exchange, lands used by other state agencies, and lands in legislatively designated areas ["LDA's"] were "sold."

the trust would not receive cash compensation for these "sold" lands. One valuation[55] would place these values on those disputed lands:

Third-party purchasers	$150 million
CIRI	45 million
State agencies	15 million
LDA's	200 million
TOTAL	$410 million

If that valuation is correct, there is $410 million worth of land which distinguishes the best and worst case scenarios. Of course, this analysis suffers from the same problem as most others: whether the valuation is correct.

There has been substantial dispute about the value of these lands from the beginning of settlement attempts. Questions over value led to the demise of the Chapter 48 settlement attempt. The Interim Mental Health Trust Commission placed a value on original mental health trust lands at about $2.2 billion in 1989; the State valued the lands at about $564 million. *See* Interim Mental Health Trust Commission Final Report (Dec. 20, 1989) (filed April 3, 1990). The valuation question has not disappeared.

The court believes that two principles are important to apply in evaluating the valuation questions with respect to the settlement versus the result of litigation: (1) in comparing the original trust with the reconstituted trust, it is most important to use the same assumptions and approach; and (2) all valuations of the land value are

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[55] The court believes this valuation to be made under Chap. 66 assumptions, but it is not clear.

based on probabilities.[56] In light of the first principle, the court will examine the various methods under the same assumptions.

Substantial valuation work was done by the Mental Health Lands Project to value original trust lands and proposed substitute lands under the Chapter 66 implementation efforts. These valuations were made assuming the provisions of the Chapter 66 settlement and therefore the values may not be sound for this settlement. Under Chapter 66 assumptions, the value of the original trust lands totalled $1.9 billion. Using those same assumptions, the reconstituted trust is valued at $1.1 billion. In light of the litigation risks associated with recovering all of the original lands, and the addition of $200 million and the other benefits of the settlement, the court concludes that evaluated this way, this settlement is within the range of acceptable settlements.

Mr. Erickson, an expert retained by Weiss and AMHA, asserts that the provisions of this settlement make the land much less valuable than it would have been under the provisions of Chapter 66. He has made discounts for (1) DNR management,[57] (2) quitclaim deeds versus warranty deeds, (3) lack of survey, and (4) split

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[56] The most significant field in anyone's valuation is for mineralized lands. However, very little is actually known about the lands. While the original lands have been the subject of geological survey, very little core drilling has been done. Thus all values are guesses, educated guesses, but guesses nonetheless.

[57] Mr. Erickson assumes the worst: the trust will be managed under the rules applicable to other state lands with no concern for the fact it is trust land.

estate and access problems. Under his evaluation, the land in the reconstituted trust is worth $566 million to which he adds the $200 million cash for a grand total of $766 million for the settlement. He did not perform the same calculations for the original trust lands, and it is important not to compare that number to $1.9 billion because the numbers are based on different assumptions.

No one provided the court with a breakdown of the $1.9 billion valuation so that Mr. Erickson's approach could be applied to obtain a value of the original mental health trust lands. In order to provide the best comparison possible with the limited data available to the court, the court has taken the Interim Mental Health Trust Commission's valuation of the original trust lands (which with Dr. Metz' revised mineral valuation totals $2.0 billion) and applied the approach. The results are found in the chart attached as Appendix A.[58] Applying Mr. Erickson's discounts to the Interim Commission's values and assuming that one-half of the lands were under DNR lease, the discounted value of original trust lands is $921.5 million.[59]

Using these figures, the comparison is between $921.5 million with a reduction for the risks of litigation

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[58] The court has used the aggregate percentage discounts as set out in Exhibit 4 (evidentiary hearing) prepared by Mr. Erickson.

[59] Of course this number could be very inaccurate if the values used in the Chapter 66 valuation which totalled $1.9 billion are very different from the Interim Commission's values. Additionally, as shown in Appendix A, if less than one-half of the lands were under DNR lease, the reduced value of the original trust lands is much smaller.

versus a land package worth $566 million, a cash component of $200 million and other benefits of the settlement. Under this approach the settlement is within the range of possible approval.

The final approach on which the court has received testimony comes from Samuel Smith, chief of the Division of Mining in DNR. Mr. Smith has analyzed the mineral value of lands which will not be returned to the trust. He starts with Dr. Metz's[60] calculation for mineral values on lands which will not be returned, $620 million. Mr. Smith has discounted that number for three of four factors on which he believes Dr. Metz erred. His revised value is $130 million. In light of the fact that mineralized land forms the bulk of everyone's valuation of original trust land, Mr. Smith's calculations, though partial and preliminary, would suggest that this settlement is within the range of acceptable settlements.

In summary, it is too soon for the court to determine what is the best valuation of the trust, but using consistent rules in any approach suggests that this settlement is within the range of acceptable settlements. However, several assumptions have been made which may be in error. The court expects to look at this issue carefully at the final approval stage.

It is important that the class considers the importance of cash to them. In essence this settlement trades some land which might be returned to the trust for cash. Risk averse individuals stress the importance of having cash

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[60] Dr. Metz was hired by plaintiffs to do valuations on the mineral estate of original trust lands.

now against the possibility of earning money in the future. Those willing to take more risks may regard cash as a bad trade for the possibility of earning much larger amounts later. This philosophical difference is part of the conflict between plaintiffs' attorneys.

2. Trial

A trial would be extremely expensive, lengthy, and complex, probably involving defendant classes as well as the plaintiff class.[61] A defendant class of third-party holders of interests in state land could contain thousands of members and require several separate subclasses. The cost to all parties in time and money would be enormous. The cost is not, perhaps, of significant interest to the class, since fees are paid by the State. However, delay should be significant. It could be years before the litigation is resolved if the case is not settled. The improvements to the mental health program and the reconstitution of the trust could be delayed for many years.

3. Discovery

While plaintiffs have not received access to all DNR records concerning agricultural parcels that contain original trust land, they know much more about the original

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[61] Weiss and AMHA already have filed motions to certify defendant classes for municipal and coal-lessee defendants. *See* Motion to Certify Class of Municipal Defendants (March 29, 1994); Motion to Certify Class of Coal Lessee Defendants (July 14, 1994).

trust lands and potential trust lands than they did in 1991 when Chapter 66 was passed. At this point plaintiffs' attorneys seem to have sufficient information about original trust lands and state lands in general to adequately evaluate the current proposal of a mixed land and cash settlement.

4. Opposition

The amount of opposition within the class cannot be fully evaluated by the court until the fairness hearing after the class has notice. Therefore the court can draw no conclusions at this time with regard to opinions of the class regarding the fairness and adequacy of the proposed settlement agreement.

5. Collusion

Weiss and AMHA imply that counsel for H.L. and Bosel negotiated a settlement favorable to the State in order to encourage the State to withdraw from the Chapter 66 settlement, which H.L. and Bosel opposed. Weiss Opp. to Prelim. Appr., at 11. Weiss and AMHA contend that H.L. and Bosel negotiated outside the parameters of what they had agreed the settlement should contain. Despite Weiss and AMHA's claims to the contrary, the court concludes there was no collusion during the negotiations.

In summary, based on this preliminary examination, the court concludes that this settlement is within the range of possible final approval.

VI. CONCLUSION AND ORDER

The HB 201 settlement appears to provide sufficient benefits to the class to justify preliminary approval. The negotiations apparently were serious, informed, and non-collusive. Deficiencies in the settlement are not sufficiently serious to warrant disapproval at this preliminary stage. There is no disparate treatment of any of the major groups of plaintiff class members. There are problems presented; some of them may be resolved by the time of the final approval hearings. There are also risks presented which need to be carefully evaluated by the class. However, the requirements for preliminary approval have been met.[62]

Thus,

IT IS HEREBY ORDERED that the court grants preliminary approval to the settlement filed June 10, 1994.

DATED at Fairbanks, Alaska this 29th day of July, 1994.

/s/ Mary E. Greene
MARY E. GREENE
Superior Court Judge

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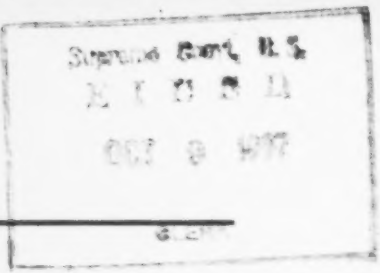
[62] Preliminary approval does not mandate final approval if class comments or other evidence at hearings shows that the HB 201 settlement is not in the best interests of the class or does not meet the standards for final approval.

(5)



No. 97-186

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

VERN T. WEISS, *et al.*,

Petitioners,

v.

STATE OF ALASKA, *et al.*,

Respondents,

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

REPLY IN SUPPORT OF PETITION

James B. Gottstein*
Bruce A. Moore
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D. C. 20009
(202) 588-1000

David T. Walker
417 Harris Street
Juneau, Alaska 99801
(907) 586-3537

Barry S. Rosen
30 South Wacker Dr., 29th Floor
Chicago, Illinois 60606-7484
(312) 207-1000

Counsel for Petitioners
*Counsel of Record

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REPLY IN SUPPORT OF PETITION FOR *CERTIORARI*

Petitioners Weiss, *et al.*, respectfully reply to the oppositions of the State of Alaska and H.L., *et al.*, to their petition for a *writ of certiorari* to review the judgment of the Alaska Supreme Court in this case.

REASONS FOR GRANTING REVIEW

1. The Court has Jurisdiction to Review the Set-Off Decision

Respondents agree with Petitioners that the *Weiss I* holding that the State may diminish the corpus of the Trust in the amount of its expenditures on its mental health program (the "set-off") is an adjudication of federal rights on the merits.[1] However, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), both Oppositions assert that the Court does not have jurisdiction to consider the issue because Petitioners were required to file an *interlocutory* petition for *certiorari* immediately after the *Weiss I* decision.[2] State Opp. at 1; H.L. Opp. at 5. *Cox* describes certain very limited situations where the Court *may* take jurisdiction before a case is finally adjudicated. Indeed, the reasons for the *Cox* exceptions to the final judgment rule support review in this case, i.e., that "later review of the federal issue cannot be had" and failure to review "might seriously erode federal policy." 420 U.S. at 481 and 483, respectively.

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[1] At page 5 of its Opposition, the State asserts the settlement "does not include any set-off." This statement is untrue. The Alaska courts accepted a $600 million diminution of Trust *corpus* value because "the set-off . . . 'has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold.' ' " App. A at 27 and n.14; App. C at 71.

[2] Respondents' position produces a "Catch 22" result because Petitioner Nanuwak was not allowed to intervene in this case until after the time for filing a petition for *certiorari* to *Weiss I* had already passed, and current counsel for Petitioner Weiss was not substituted into the case until even later.

Neither *Cox*, nor any other case *requires* an interlocutory petition for *certiorari* to be filed when a case has been remanded back to the lower court.

> Of course, after remand for further proceedings from a nonfinal decision of the state court [where the federal issue was decided], a final judgment may be obtained at trial, and appellate review of the federal issue may then be pursued. In this posture, Supreme Court review may be properly sought under §1257. The fact that the highest state court in the second appeal refuses to reconsider the federal issues decided in the first appeal does not deprive the Supreme Court of jurisdiction to review the second judgment. *Great Western Tel. Co. v. Burnham*, 162 U.S. 339 (1896); *Louisiana Nav. Co. v. Oyster Commission*, 226 U.S. 99, 102 (1912); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *cf. United States v. United States Smelting Co.*, 339 U.S. 186, 198-99 (1950); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) ... And the state court's designation of the earlier ruling as the law of the case does not affect the power of the court to reexamine the earlier ruling in this context. *Davis v. O'Hara*, 266 U.S. 314, 321 (1924); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982); *Barclay v. Florida*, 463 U.S. 939 (1983); *California v. Rooney*, 483 U.S. 307, 311-14 (1987). Otherwise the orderly process of review would be frustrated, and the litigant would lose all chance for Supreme Court scrutiny of the claim of federal rights.

Stern, Gressman, Shapiro, & Geller, *Supreme Court Practice*, 104-5 (7th ed. 1993). If, however, there are circumstances in which an interlocutory petition for *certiorari* is required, review should also be granted here to clarify those circumstances.

2. Important Federal Rights Were Adjudicated

The Oppositions of the State and H.L. bring into sharp focus the important questions of federal law raised by this Petition. Both assert that, because the Petition arises out of a judgment approving a class action settlement, rather than a direct ruling on the underlying merits of the class' claims, the Court should not grant review. State Opp. at 8; H.L. Opp. at 3. Under Respondents' approach, no matter how crucial the federal rights are to a proper disposition of a class settlement, and no matter how erroneous the state court's analysis of those rights may be, there are no federal questions for this Court to review. Petitioners respectfully suggest that acceptance of Respondents' position grants the states *carte blanche* authority to misapply, to the point of amending, federal law so long as such misapplication arises within a class action settlement. Contrary to Respondents' assertions, this is an issue of nation-wide applicability and importance.

It is particularly so in light of *Matsushita Electrical Co., v. Epstein*, ___ U.S. __, 116 S.Ct. 873 (1996), where the Court made clear that the federal courts are bound to give preclusive effect to state court settlements that include a *federal claim* in which the exclusive jurisdiction to adjudicate lies in the federal court. The *Matsushita* scenario assumes that the Court may correct state court errors by granting a petition for *certiorari*. Yet if the Respondents' position regarding class action settlements is correct, *no federal court* will ever correct the error of federal law. This gives state courts untrammeled leave to circumvent federal law.

Petitioners also suggest that properly construing and enforcing Congress' intent in the Enabling Act is itself an important federal issue as Congress made the determination of the purposes for which this land was to be employed as a condition of its trust grant. Since there will never be a conflict with any other court on this issue, only by granting *certiorari* can the Court "assure that the binding application of federal law is uniform and ultimately subject to control by this Court." *Asarco v. Kadish*, 490 U.S. 605, 621-2 (1989). In other words, review should be granted here because, "later review of the federal issue cannot be had"

and failure to review "might seriously erode federal policy." *Cox, supra,* 420 U.S. at 481 and 483, respectively.

3. Respondents Err in Contending That All Other Authority Pertaining To Federal Land Trusts Is Inapplicable

The Respondents assert that Congress' intent in the Enabling Act was so different from all other Congressional trust land grants that any harm done by failing to grant *certiorari* will only affect Alaska. State Opp. at 9-10; H.L. Opp. at 6. Respondents do not address Petitioners' showing that "the purpose of [the Enabling Act] is the same as in all other similar grants such as the public school land-grant program." 102 Cong. Rec. 9761 (June 7, 1956).[3]

According to Respondents, contrary to *all* other federal trust land grants: (1) the Enabling Act "imposes no affirmative duties on Alaska regarding the management and disposition of trust lands" (H.L. Opp. at 6);[4] (2) the Trust's *corpus* may be diminished in the amount of the State's annual expenditure on its mental health program without consideration of the beneficiaries' interests (State Opp. at 13); (3) conveyances of Trust land without consideration of the beneficiaries' interests and without depositing receipts that may have been received into the Trust, are not a breach of trust and such conveyances are exempt from re-

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[3] The Enabling Act mandates Trust lands be administered "as a public trust." Sec. 202(e), Alaska Mental Health Enabling Act, Pub. L. No. 84-830, 70 Stat. 709 (1956). The only unique aspect of the trust grant is the provision that the Trust be used "first" for the "necessary expenses of the mental health program." *Id.* As explained in *Weiss I*: "Any money received over and above the need for the mental health program may be used for other public purposes . . . only because of worry among members of Congress that the land may actually have a value far in excess of the necessary health care expenses." App. B at n.1.

[4] This statement of settling plaintiffs' counsel demonstrates both that the settlement was measured against the incorrect legal backdrop (i.e., the State does have fiduciary responsibilities under the Enabling Act) and the inadequacy of representation (i.e. intervenors' counsel who supported the settlement did not comprehend the class' legal rights).

covery by the Trust (State Opp. at 13-14); and (4) the beneficiaries are not entitled to mismanagement damages because of *state law* (State Opp. at n.14). Respondents do not dispute that *Weiss II* conflicts with all relevant authority relating to other federal trust land grants, relying instead on the alleged unique, non-fiduciary nature of this trust. In essence, Respondents claim that Congress did not intend to create a trust under the Enabling Act. However, as has been shown, Congress specifically intended the Enabling Act to create a trust with the same fiduciary obligations of the other trust land grants.

4. The Alaska Supreme Court's Approval Of A Management Scheme That Violates Federal Law Is Ripe For Review

The State argues it is premature to raise any illegality in the settlement under federal law because no illegal actions have occurred yet. State Opp. at 17. However, it is the approval of a settlement that allows illegal actions that mandates disapproval, *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983), and strongly suggests review by the Court.

Weiss II approved a settlement which allows a divided loyalty regime in violation of federal law. *County of Skamania v. State of Washington*, 685, P.2d 576, 580 (Wash. 1984). *Weiss II* expressly held that other congressional trust land grants do not require the undivided loyalty of the trustee (management for non-trust interests "is not necessarily incompatible with trust principles, even under the stringent rules governing school trust lands"). App. A. at 33-34. This holding conflicts with all other controlling authority *and is expressly not limited to the posited "unique" nature of the Alaska Mental Health Land Trust.*

As indicated in the Petition, *Weiss II's* holding that federally granted *school trust lands* need not be managed with undivided loyalty will encourage other states to violate the duty of undivided loyalty. Indeed, the 1992 law review article relied upon by the court in *Weiss II* as support for its conclusion that the settlement's management scheme is legal (App. A at n.25), is

entirely devoted to the proposition that the courts have enforced the duty of undivided loyalty too vigorously:

> The purpose of this Article is to suggest that the conventional wisdom [court decisions requiring the trusts to be managed solely for the purposes designated by Congress] is misleading. . . . [P]ressure from environmentalists and evolving notions of what constitutes ecologically sound and *politically acceptable* land management have led some states to seek flexibility.

S. Fairfax, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 799-800 (1992) (emphasis added, footnotes omitted). The Alaska Supreme Court's decision in *Weiss II* creates new federal law opening up all federal trust land grants for use by non-trust interests. The Court should correct this.

5. The Settlement Was The Result Of Inadequate Representation

Respondents assert that Petitioners' inadequacy of representation claim is no more than "want of an incantation that 'representation was adequate.' " State Opp. at 23. *See also* H.L. Opp. at 9. Nothing could be further from the truth. Petitioners' claim is that, as a matter of law, the settlement was the result of inadequate representation because (1) Original Class Counsel, without consultation with any class member, stipulated to the set-off, and (2) Respondents H.L., who were never designated as Class Counsel or replaced Petitioners, among other things, agreed to a settlement which incorporates the set-off, without having any idea of the extent of a major class claim -- mismanagement damages. As H.L.'s counsel said to the trial judge:

> I am not suggesting by that that those [mismanagement] claims haven't been made and that they don't exist and that they might be real. It's just that there's been no discovery to establish their size, the extent, the legitimacy of them . . .

(Tr. XXVI-751). Even if there had been an express determination that the settlement was the result of adequate representation, such a finding fails because, as shown, representation was inadequate as a matter of law.[5]

Contrary to the assertions of Respondents (*See* H.L. Opp. at 11), this case presents a clear opportunity for the Court to enunciate the minimum due process requirement for adequacy of representation in class action settlements. In other words, is the due process requirement of adequacy of representation satisfied when class counsel stipulates to the waiver of a major class defense without consulting any class member, without scrutiny by the court, when the waiver is legally unwarranted, and when, as a legislator, he voted for the challenged legislation? Similarly, is due process satisfied when counsel settles a class action without any idea of the "size, extent or legitimacy" of a major class claim?

The Court has indicated that adequacy of *counsel's representation* is an issue which might be addressed by the Court at some point. *Amchem Products, Inc. v. George Windsor*, No. 94-1474 at 20, n.20 65 U.S.L.W. 4635 (June 25, 1997); and *General Telephone Co. Southwest v. Falcon*, 457 U.S. 147, n.13 (1982). While both *Amchem* and *General Telephone* declined to enunciate the standard for counsel's representation because they were decided on other grounds, the Court has made clear that adequacy of class counsel is an integral part of a binding class action. In addition, the State and H.L. do not deny that the settling intervenors were never designated class representatives. Thus, according to Respondents, the class should be bound to a settlement that was not accepted by any class representative or

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[5] The State asserts that Petitioners did not raise the issue of inadequate representation before the trial court. State Opp. at 23. This is untrue. In their opposition to final approval, Petitioners raised specific instances of inadequate representation, and cited *In re: General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1124-26 (3rd Cir 1979), for the proposition that a "stringent examination of the adequacy of representation by . . . counsel" is required. R. at 23764 -23772.

any class counsel. *Weiss II* holds that adequacy of counsel's representation is not a class action requirement ("[no] authority requires the trial court to make a specific finding that the class is adequately represented by counsel"). App. A at n.30. This case presents an excellent opportunity to make it clear to the states that adequacy of counsel's representation is required.

6. The Issues Raised by Petitioners Are Properly Before the Court

In their effort to persuade the Court to deny review, Respondents assert that various issues have been waived by Petitioners or represent inconsistent positions. For example, Respondents claim Petitioners have waived or acted inconsistently with respect to challenging the set-off holding and mismanagement damages. State Opp. at 12 and 16. Carefully excised from the quote at page 12 regarding the setoff is Petitioners' statement that they "disagree that the trustee should be able to dissipate the trust in this manner [via the set-off]." Exc. 1064. This is hardly a waiver or an inconsistent position.

The State also asserts that Petitioners waived the right to contest the set-off because the Alaska Supreme Court said counsel for Petitioner Nanuwak stated his "general satisfaction" with *Weiss I*. State Opp. at n.15. Any "general satisfaction" with *Weiss I* certainly did not encompass an interpretation that: (1) the setoff to "sold" lands applies to 350,000 acres of land the State still owns; (2) the hitherto unanimous authority that the Trust could recover land conveyed in breach of trust does not apply; and (3) that the Trust can not recover mismanagement damages.

Similarly, when the State asserts at page 16 that Petitioners waived the mismanagement damages claim with an inconsistent statement, the State omits the preceding sentence from its quote, to wit: "The [Petitioners] also argue that before taking the setoff the court should consider what the trust should have earned if it had been properly managed." Again, this is hardly a waiver

or an inconsistent position.[6]

Another claim of waiver (or estoppel) made by Respondents is that the class definition adopted by the trial court was the same one that Petitioners urged and therefore Petitioners are estopped from seeking review of it. H.L. Opp. at 12. But Petitioners are not seeking review of the class definition. They are seeking review of the Alaska courts' determinations "allowing the Alaska State Legislature to add to the beneficiaries specified by Congress" and that "the mentally retarded and mentally defective are beneficiaries" of the Trust. Petition at 25 and 26, respectively.[7]

The definition of the class is a different (albeit related) matter. The motion Respondents point to had to be made by Petitioners because Respondents refused to address the improper situation that the defined class did not consist of those whose rights were supposedly being enforced. Prior to the motion, the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska." App. C at 8. As pointed out in Petitioners' motion below, (Exc. 1171-2), this class definition excluded those currently receiving mental health services, but included everyone else, because they might be in need of such services in the future. Petitioners recognized that

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[6] The context of these statements is also important. They were made in support of the 1992 settlement agreement between Petitioners and the State, from which the State withdrew in 1994. Exc. at 565, ¶ 95. The 1992 settlement provided a *100% recovery of the Trust's economic value, including income production.* Exc. 289. Because of the Enabling Act's provision that income in excess of the needs of the mental health program could be used by the State for other purposes (*see infra* n.3.) and because it isn't possible to spend the money on the mental health program that should have been spent in the past, any recovery of *income* damages above the Trust's original corpus value would not accrue to the class.

[7] Respondents do not dispute that these determinations adjudicate federal rights (as opposed to "weighing" them as "litigation risks" in the settlement approval process).

the class had to consist of the beneficiaries of the Trust if those were the rights being enforced.

H.L. opposed the motion and redefinition he now supports saying: "Were this court to now redefine the class as Weiss proposes, it would be acknowledging that a class action of some ten-year duration had been prosecuted by non-class members." R. at 21805. The issue of whether Petitioners should be estopped from appealing the trial court's determination of the Trust's beneficiaries was briefed to the Alaska Supreme Court. H.L. Br. at 9; Pet. Reply Br. at 24. The Alaska Supreme Court did not hold that Petitioners were estopped and neither should this Court.

Petitioners respectfully urge the Court to recognize Respondents' claims of waiver and inconsistent positions to be what they are: attempts to obfuscate the serious errors committed in *Weiss II* in applying federal law and the concomitant conflict with the decisions of this and other courts respecting the due process requirements of class action settlements.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge their Petition for Writ of *Certiorari* be granted.

Respectfully Submitted.

James B. Gottstein*
Bruce A. Moore
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D. C. 20009
(202) 588-1000

David T. Walker
417 Harris Street
Juneau, Alaska 99801
(907) 586-3537

Barry S. Rosen
30 South Wacker Dr., 29th Floor
Chicago, Illinois 60606-7484
(312) 207-1000

Counsel for Petitioners
*Counsel of Record

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